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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEE ENTERPRISES, INCORPORATED, a Delaware Corporation and DONALD SCHWENNESEN,
Petitioners,

v.

WARREN E. SIBLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court, by viewing contradicted evidence of actual malice in the light most favorable to a public official libel plaintiff without conducting an independent review of the record, violated the constitutional requirement of independent appellate review mandated by this Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and other cases.

2. Whether the Montana Supreme Court's rejection of a jury instruction defining "reckless disregard of the truth" as "publishing an article with a high degree of awareness of its probable falsity" or "entertain[ing] serious doubts as to the truth of the publication" conflicts with this Court's decisions in *St. Amant v. Thompson*, 390 U.S. 727 (1968) and its progeny.

3. Whether the record in this case fails to establish with convincing clarity that petitioners published false statements with actual malice.

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OPINION BELOW

The opinion of the Supreme Court of Montana, dated November 25, 1986 is reported at 729 P.2d 1271 and is reproduced as Appendix A to this Petition.

JURISDICTION

The decision and order of the Montana Supreme Court was entered November 25, 1986, reversing the judgment of the trial court entered December 14, 1984, on a jury verdict in favor of Petitioners. A timely Petition for Rehearing was denied on January 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In late 1982, *The Missoulian*, a newspaper owned by the petitioner Lee Enterprises, Inc.,[1] published several articles about an investigation of the Flathead County, Montana, sheriff's office and the complaints of a number of deputies that triggered the investigation. One of these articles, written by petitioner Don Schwennesen and published December 29, 1982, is the subject of this libel action. The article is reproduced in its entirety as Appendix D. It reports charges against Sheriff Al Rierson made by a former sheriff's detective, Max Salisbury,[2] in a notarized statement given to the governor of Montana. The charges centered on Sheriff Rierson's handling of the alleged theft of a meat smoker by another deputy, the respondent Warren Sible, and Sible's appointment as

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[1] Lee Enterprises, Incorporated has no parent, subsidiary, or affiliate corporations. (Supreme Court Rule 28.1.)

[2] Max Salisbury was one of the original defendants in this case. He remained a named party in the Montana Supreme Court proceedings, although he had reached a settlement with the plaintiff before trial. All other parties to the proceedings below are named in the caption of this Petition. (Supreme Court Rule 21.1(b).)

Chief of Detectives while the investigation was still in progress. Salisbury charged that he was subsequently reprimanded and reassigned because of his part in pressing the investigation.

Schwennesen obtained a copy of the statement and conducted his own investigation of the charges. Everyone he interviewed confirmed the basic facts of the alleged theft, the investigation by Salisbury, Sible's appointment by the sheriff, and Salisbury's subsequent reprimand and reassignment. Sible himself admitted he had the smoker in question, but denied stealing it. Both the sheriff and Sible confirmed the fact of Salisbury's reprimand and reassignment, but denied Salisbury's charge that it was connected to his investigation. App. D.

Schwennesen's article reported the substance of at least eight separate interviews, with a major part of the article devoted to Sheriff Rierson's and Lieutenant Sible's side of the story.[3] The article reached no conclusion on the merits of either Salisbury's charges or the smoker investigation, but simply noted that the investigation of the sheriff's office was continuing.[4] *Id.*

On February 7, 1983, approximately five weeks after publication, Sible sued *The Missoulian*, Schwennesen, and Salisbury for defamation, claiming $30,000,000 in damages. The complaint alleged that the charges of theft,

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[3] Sible did not dispute the accuracy of Schwennesen's reporting. He alleged libel from republication of Salisbury's charges and use of the words "theft," "harassment," and "cover-up" in the article. Brief of Appellant at 3.

[4] The statement of facts included in the Opinion of the Montana Supreme Court, App. at 2a-5a, does not accurately reflect the record. Rather, as the court admitted, it "view[s] the evidence in a light most favorable to the appellant," App. at 2a, and was taken directly from highly selective and argumentative assertions contained in the Brief of Appellant. The court also admitted that the evidence was disputed. App. at 5a.

cover-up, and harassment were false and were published with actual malice.

Trial to a jury commenced November 5, 1984. The testimony at trial was substantially the same as the statements made to the reporter, reflecting the same differences of opinion and interpretation reported in the article. There were two significant differences, however.

First, plaintiffs called as a witness John Christian, a subordinate of Sible, and Salisbury's former partner, who had not been interviewed by Schwennesen.[5] Christian confirmed many of the details reported in the article, but he also testified that, had he been interviewed, he would have told Schwennesen that the investigation of Sible was completed, and that he concluded that Sible's smoker was not the same one reported as stolen.[6] Tr. 1054-65.

Second, in the middle of trial Sible reversed his prior statements to the reporter that he had possession of the missing smoker. Sible testified that until midtrial he believed that he had the smoker in question and had told Schwennesen that he had it, but he now realized that it was not the same smoker. Tr. 1340.

After a four-week trial, the jury returned a verdict finding that the charges were false, but that the plaintiff had failed to prove

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[5] Salisbury originally suggested that Schwennesen contact Christian to corroborate his charges. Tr. 415. When the reporter called, he was told Christian was on vacation. Tr. 1851. By the time Christian returned from vacation the basic facts had already been corroborated by the sheriff, Sible, and others, and Schwennesen was satisfied that Salisbury's charges were made in good faith. Tr. 1872-73.

[6] Much of Christian's testimony was impeached by prior inconsistent statements from his earlier deposition testimony. He also admitted that after the article was published, he destroyed photographs used for identification of the smoker during the investigation. Tr. 1113-29 and 1144-45.

> by clear and convincing evidence that the newspaper article was published by defendants Don Schwennessen and Lee Enterprises, Inc. with "actual malice," that is, knowing it was false, or in reckless disregard of whether it was true or false.

App. at 13a-14a.[7] Judgment on the verdict was entered for defendants; plaintiff's motion for a new trial was denied January 26, 1985, and the case was appealed to the Montana Supreme Court.

The issues presented by this Petition were argued to the Montana Supreme Court in both the briefs of the parties and the petition for rehearing.

On the issue of appellate review, Sible himself acknowledged that the appellate court was required under *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), to conduct an independent review of the record as to the ultimate question of actual malice, giving due deference to the jury's findings on issues of credibility. Brief of Appellant at 33. Petitioners responded that the jury's verdict could be sustained under traditional principles governing review of jury determinations, but that in any event, the constitutional requirement of clear and convincing proof and the subjective nature of the actual malice determination, when taken together, were sufficient to sustain the jury's verdict on the issue, even under Sible's argument of the *Bose* standard of review. Brief of Respondents at 24-25.

The Montana Supreme Court ignored both positions and held instead, without citation of authority, that it "must view the evidence in a light most favorable to the appellant and then determine whether the court's instructions adequately presented appellant's case to the jury." App. at 2a.

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[7] The trial court had previously ruled that Sible, a Lieutenant and Chief of Detectives in the Sheriff's Department, was a public official for purposes of application of the *New York Times* rule. Sible continued to contest that ruling on appeal.

On the issue of actual malice, Sible argued several theories.[8] His principal theory, however, was that Schwennesen's failure to interview Christian constituted a "departure from the standards of investigating and reporting normally adhered to by responsible journalists," and that such "departure from normal standards" constituted "reckless disregard of the truth" under Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts*, 338 U.S. 130 (1967).[9] Brief of Appellant at 34. He challenged Jury Instructions 12 and 13 on this ground.

Petitioners argued that the determination of actual malice was controlled by *St. Amant v. Thompson*, 390 U.S. 727 (1968), and its progeny, and that the instructions given by the trial court were proper under those cases.

The Montana Supreme Court, without citation to or discussion of *St. Amant*, ruled that Jury Instruction 12 defining "reckless disregard" in language taken verbatim from *St. Amant* was "fatally defective" in that it prevented the jury from finding reckless disregard from failure to investigate where the reporter has no actual serious doubts about the falsity of the material, but

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[8] Sible argued that *The Missoulian* knew its charges were false because it knew Sible was not charged with "theft," but was "the subject of a non-criminal internal probe," and it knew there had been no "cover-up," because the complaint about the smoker had been aired publicly. He also argued that the Missoulian had obvious reasons to doubt the truthfulness of Salisbury's notarized statement to the Governor, because it knew Salisbury was a disgruntled ex-employee and his statement was politically motivated. Brief of Appellant at 37-43.

[9] Justice Harlan's opinion commanded the votes of only three other members of the Court. The remaining Justices, comprising a majority, would have applied the *New York Times* test of actual malice or even greater protection. 388 U.S. at 170 (Warren, C.J., concurring), 170-72 (Black, J., joined by Douglas, J., concurring), and 173 (Brennan, J., joined by White, J., concurring).

knows that the source of its information is "highly suspect." [10] App. at 6a.

A timely petition for rehearing was filed by petitioners, rearguing the propriety of the *St. Amant* definition of "reckless disregard" and arguing the need for independent appellant review of the actual malice issue under *Bose*. The petition for rehearing was denied without opinion on January 13, 1987. App. at 15a.

ARGUMENT

I. SUMMARY REVERSAL IS APPROPRIATE IN THIS CASE

The errors of the Montana Supreme Court in this case are so obvious under this Court's rulings in *Bose* and *St. Amant* that further briefing and argument of the points should be unnecessary, and summary reversal under Supreme Court Rule 23.1 is appropriate.

The Montana court ignored its constitutional duty to independently "determine whether the record establishes actual malice with convincing clarity," as required by *Bose*, 466 U.S. at 514, and compounded the error by viewing the evidence in a light most favorable to the libel plaintiff, the *losing* party at trial.

The court then rejected jury instructions incorporating the very language and reasoning used by this Court

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[10] On appeal, Sible also argued that he should not have been considered a public official and that the trial court erred in refusing to compel production of Schwennesen's notes, protected under a Montana "shield law" or "reporter's privilege" statute. Petitioners cross-appealed from the trial court's failure to grant summary judgment for defendants prior to trial. The Montana Supreme Court found two of these issues to be dispositive—the issue of the actual malice jury instructions, and the state "shield law" issue. The court's ruling that protection of the shield law was waived is not presented here as a separate question for review. However, it is relevant to a complete review of the record under *Bose* and therefore should not be viewed as purely a matter of state law.

to define "reckless disregard of the truth" in *St. Amant*, and did so without once mentioning that case:

> Under the instructions of the court, the jury could have found that *The Missoulian* was reckless in failing to investigate but nevertheless found there was no malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement. Upon remand, the Court will instruct upon the proper standard without embellishment.

App. at 7a.

Here, the need for summary reversal is particularly acute. If this Court does not reverse these errors, the trial court upon remand, and every other trial court in the State of Montana, will be faced with an impossible dilemma. They will have to choose either to disregard the constitutionally based mandate of this Court in such cases or to disregard the unequivocal order of the highest court of Montana.

By the Montana Supreme Court's own words, "the jury could have found . . . there was no [actual] malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement." App. at 7a. This being so, it is clear that the verdict in favor of the newspaper was proper and should be reinstated. Under Supreme Court Rule 23.1 this Court may, and should, issue an order summarily reversing the decision of the Montana Supreme Court and reinstating the judgment of the trial court below.

II. THE MONTANA SUPREME COURT FAILED TO INDEPENDENTLY DETERMINE THE ISSUE OF ACTUAL MALICE AS REQUIRED BY THIS COURT IN *BOSE*

In *Bose Corp. v. Consumers Union of United States*, this Court recently reaffirmed the constitutional duty of all appellate courts to "exercise *independent* judgment and determine whether the record establishes actual mal-

ice with convincing clarity." 466 U.S. at 514 (emphasis added). *Bose* made it clear that this obligation of independent review "is a rule of federal constitutional law," *id.* at 510, that preempts the convenient presumptions and inferences applied by appellate courts in ordinary cases. It also made clear that appellate courts " 'cannot avoid making an independent constitutional judgment on the facts of the case.' " *Id.* at 508 n.27, quoting *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (Opinion of Brennan, J.)

In this case, because jury instructions were challenged, the Montana Supreme Court confined its review solely to a view of the evidence "in a light most favorable to the appellant [plaintiff]," App. at 2a, to determine whether his theory of the case was adequately presented to the jury. The court made no attempt to review the substantial and conflicting evidence from which the jury found an absence of actual malice.

The Montana court's failure to independently review the evidence had a pervasive effect on its decision. By blindly accepting the plaintiff's version of the facts, the court was led to believe that *The Missoulian* knew the charges against Sible were "highly suspect," a conclusion that would have been impossible upon a review of the entire record. This faulty assumption, in turn, led the court to conclude that under such imagined circumstances, a newspaper "should, and it does, have a duty to investigate before publishing," App. at 6a, and to remand the case for a new trial, without any further discussion of the record.

Thus, as a result of the appellate court's failure to independently examine the evidence, a proper jury verdict and judgment achieved by the Petitioners after an expensive and time-consuming trial were reversed and remanded for still further proceedings. There was simply no consideration by the Montana court of whether the

evidence satisfied the threshold constitutional standard of convincing clarity. This is precisely the kind of threat to First Amendment freedoms that this Court's ruling in *Bose* sought to prevent. *See* 466 U.S. at 510-11.

If the decision of the Montana Supreme Court is not summarily reversed as requested in Section I, *supra*, then certiorari should be granted not only to cure the unconstitutional result in this case, but also to emphasize for other appellate courts the importance of their constitutional duty to independently review evidence of actual malice in libel cases.

III. THE INSTRUCTION ON "RECKLESS DISREGARD" REQUIRED BY THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH EVERY PRONOUNCEMENT OF THIS COURT ON THE ISSUE

In *St. Amant v. Thompson*, this Court defined "reckless disregard of the truth" as that term relates to the determination of actual malice and explained its rationale:

> Our cases . . . have furnished meaningful guidance for the further definition of a reckless publication. . . . In *Garrison v. Louisiana*, 379 U.S. 64 (1964) . . . the opinion emphasized the necessity for a showing that a false publication was made with a "*high degree of awareness of . . . probable falsity.*" 379 U.S., at 74. . . . These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact *entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. at 731.

The trial court, in a conscientious attempt to avoid confusing the jury, gave two instructions drawn directly

from *St. Amant.* The first incorporated the language emphasized in the above quotation:

> INSTRUCTION NO. 12
>
> The term "reckless disregard of the truth," as used in these instructions, does not mean mere negligence, or even gross negligence or wanton conduct. Rather, it means publishing an article with a high degree of awareness of its probable falsity, or that the Defendants, in fact, entertained serious doubts as to the truth of the publication.

App. at 5a. The second instruction quoted almost verbatim from *St. Amant*, 390 U.S. at 731, the examples suggested by this Court of conduct which might indicate evidence of reckless disregard. App. at 5a-6a.

The Montana Supreme Court, in reversing both instructions, did not attempt to explain its departure from the rule in *St. Amant;* the court simply ignored it:

> Instruction No. 12 is fatally defective in that it defines "reckless disregard of the truth," as used in Instruction No. 11, as being equivalent to having serious doubts about the truth of the statement.

App. at 6a. Even more puzzling, the court justified its conclusion by noting that "[s]uch a rule encourages irresponsible journalism," App. at 6a, the very argument discussed at length and rejected by this Court in *St. Amant.*[11]

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[11] *See St. Amant*, 390 U.S. at 731-32:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. . . . But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

This Court has reasserted and followed the *St. Amant* formulation of "reckless disregard" in every relevant decision over the past 19 years.[12] If the decision of the Montana Supreme Court is allowed to go unchallenged, it will stand as a summary reversal, unreasoned and unexplained, of one of the fundamental tenets of the actual malice rule—that the showing necessary to overcome First Amendment protection is an inquiry into the publisher's subjective state of mind, not a jury's vague notion of what constitutes "reckless" conduct.

As previously noted, this case is appropriate for summary reversal on this issue. If that is not the order of this Court, however, then certiorari must be granted to consider the full implications of such a drastic departure from the established First Amendment principles governing defamation law.

IV. THERE IS NO CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE UNDER ANY PROPER FORMULATION OF THE RULE

The jury in this case, properly instructed on the issues of actual malice and reckless disregard, specifically found that the plaintiff had failed to establish actual malice with convincing clarity. There is no need for this Court to go further. As the Montana Supreme Court itself recognized:

> Under the instructions of the court, the jury could have found . . . there was no [actual] malice because the Missoulian did not entertain serious doubts about the actual truth of the statement.

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[12] *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 511 n.30; *Herbert v. Lando*, 441 U.S. 153, 156 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971). *See also Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 163 (1979); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 75-76 (1964).

App. at 7a (emphasis added). Under *St. Amant*, of course, such a finding by the jury was entirely proper and was consistent with both the purpose and the rationale of the actual malice rule as expressed by this Court. From this finding alone, the Court could conclude that, *a fortiori*, the evidence lacked convincing clarity, and that the verdict and judgment in the trial court should be summarily reinstated under Rule 23.1.

On the other hand, it can be argued that independent review of the evidence is required by *Bose* regardless of the jury's finding on the issue of actual malice. *See Bartimo v. Horsemen's Benevolent and Protective Ass'n*, 771 F.2d 894, 896-98 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1635 (1986). Although the logic of such an argument is open to question, it should not affect the Court's ultimate decision in this case. Even a brief review of the news story itself and the undisputed facts should convince the Court that a finding of actual malice is virtually impossible on this record.

The argument that petitioners knew Salisbury's charges were "highly suspect" simply is not supported by the record. The evidence shows that *The Missoulian* did not merely report Salisbury's charges, but subjected them to a responsible and searching inquiry, interviewing at some length the key figures involved. The result of that investigation convinced Schwennesen and his editors that the charges had a reasonable basis and were made in good faith. Tr. 1952-53.

Among other things, at the time of publication everyone, including Sible himself, believed he had the missing smoker. The sheriff had ordered an investigation. These facts alone made Salisbury's charges anything but "suspect". Tr. 282, 311, 1838-39, 1856, 1858, 1864. In addition, both Sible and the owner of the missing smoker independently recalled facts that tended to fix the events at a single point in time, which resolved any discrepancy between the owner's recollection of 1975 as the time of

the theft and Sible's off-hand remark that he had acquired his smoker some "14 years ago". Tr. 1858, 1860-61. Finally, it was undisputed that the sheriff appointed Sible Chief of Detectives and transferred Salisbury to the patrol division before the investigation of Sible was completed. A knowledgeable source in the County Prosecutor's Office also contradicted the sheriff's claim that the investigation had been resolved. These facts supported Salisbury's charge that the investigation of Sible was covered up. Tr. 474, 476, 1840, 1866.

From all evidence available at the time of publication, Salisbury's allegations were anything but "highly suspect." Nevertheless, Schwennesen discussed the inconsistencies among the various versions of the facts with his editor, and together they resolved any doubts about the probability or good faith of Salisbury's charges. In their minds, Sible's admission that he was in possession of the smoker was a key factor that added further credibility to Salisbury's charges. Tr. 1967. At the time of publication, they clearly entertained no serious doubts as to the truth of the statements published.

Finally, it must be noted that the jury had before it an instruction detailing in the language of *St. Amant* that actual malice *could be found* from "inherently improbable" charges or "obvious reasons to doubt the veracity of the informant." The fact that the jury found an *absence* of actual malice in the face of these instructions stands as the strongest indication that it believed Schwennesen's assertions of good faith.

On this record, under any proper formulation of the reckless disregard rule, it is clear that actual malice was not and could not be established.

CONCLUSION

The damage caused by the errors in this case cannot be overstated. The Montana Supreme Court did not merely fail to perform its own constitutional duty under *Bose*; it totally nullified the First Amendment protection secured through careful application of the actual malice rule by the trial judge and the jury.

The serious impact of the court's error is not confined to this single case. The Montana Supreme Court has, in effect, overruled application of the *St. Amant* rule in Montana, and has drastically undermined the purposes of the actual malice rule.

Petitioners respectfully urge this Court to act immediately to reverse these errors, either by summary reversal of the Montana Supreme Court or by granting certiorari to conduct its own review of this record.

Respectfully submitted this 14th day of April, 1987.

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1986

No. 85-181

WARREN E. SIBLE,
Plaintiff and Appellant,

v.

LEE ENTERPRISES, INC., an Iowa Corp.;
DONALD SCHWENNESEN; and MAX SALISBURY,
Defendants and Respondents.

Appeal From District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Michael Keedy, Judge presiding

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Submitted on Briefs: June 12, 1986

Decided: November 25, 1986

Filed:

/s/ Ethel M. Harrison
ETHEL M. HARRISON
Clerk

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

This is an appeal from the Flathead County District Court jury trial and verdict finding the respondents had not published a newspaper article with actual malice.

We reverse and remand for a new trial.

On December 29, 1982, *The Missoulian* published an article authored by Donald Schwennesen headlined "Ex-detective accuses Flathead County sheriff of coverup, harassment." The article concerned an allegation by a former Flathead County Sheriff's detective, Max Salisbury, that appellant, Sible, had stolen a meat smoker and covered up the investigation concerning the theft.

Numerous issues are raised in this Court but we find two to be dispositive and to require reversal. Appellant contends that the court improperly instructed the jury on duties owed by *The Missoulian* to appellant, Sible. Further, appellant contends that the court erred in applying the "shield law" to protect Schwennesen's notes from being discovered once he had testified as a witness. We find the appellant to be correct on both counts.

First, we must view the evidence in a light most favorable to the appellant and then determine whether the court's instructions adequately presented appellant's case to the jury. For our purposes, we assume that appellant was a public official and that the "malice" standard articulated in New York Times Co. v. Sullivan (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, applies to the case we here review.

In summary, in viewing the evidence in a light most favorable to the appellant, *The Missoulian* article charged that appellant had been investigated for theft and indicated that he may have misused his official position by participating in a coverup of his crime. Specifically, the article states that Max Salisbury filed a notarized statement with the Governor of Montana charging "his in-

vestigation of a theft involving a fellow officer (appellant) was covered up." The article further stated that appellant harassed Salisbury and forced him to terminate his employment.

The charges of theft concerning appellant arose as the result of a "smoker" allegedly taken from one William Eckerson. Eckerson lost his "smoker" in 1974. The "smoker" was worth between $15 and $20. Appellant did in fact have a similar "smoker", but he obtained his "smoker" in 1970. A subsequent internal investigation within the Sheriff's Department determined that appellant's "smoker" was not the one taken from Eckerson and the matter was dropped. The "smoker caper" was generally known to the Kalispell journalism community. Dan Black, managing editor of *The Daily Interlake*, in Kalispell, refused to publish a story because of the unreliability of the charges made by Salisbury against appellant.

Salisbury's statement regarding appellant was made during a time of political controversy. Sheriff Rierson, the incumbent Flathead County Sheriff, was engaged in a hot election contest during the fall of 1982. Salisbury was supporting Rierson's opponent. On October 6, 1982, Rierson's opponents gathered at the home of one Stevens for the purpose of developing campaign strategy. Salisbury attended this meeting. Stevens informed Salisbury during the meeting that they needed a statement from Salisbury charging appellant with stealing the "smoker" so that they could embarrass Rierson by showing appellant, who worked for Rierson, covered up the investigation of his own theft. At the meeting, Stevens told Salisbury that his friend, the reporter Schwennesen, promised to write an article after the statement was prepared.

Schwennesen knew Stevens disliked Rierson's administration. Schwennesen informed Stevens that a written notarized statement was necessary for him to write a story. Schwennesen admitted he knew Salisbury's state-

ment resulted from Stevens' encouragement and that he knew Stevens was helping Rierson's opponent. Schwennesen further knew that Stevens had assisted Salisbury in preparing the statement which provided the basis for the subject story in *The Missoulian*. Salisbury became very nervous about Schwennesen doing a story on the "smoker caper." One John Christian was an investigating officer on the "smoker" allegation. Salisbury asked Schwennesen to contact Christian about the truth of the charges, stating Christian would be open and honest. Both Schwennesen and his editor were aware that Salisbury was nervous about the charges and had requested Christian be contacted to confirm the truth or falsity of the allegation before an article was published.

Schwennesen promised to make an independent investigation of the truth of the charges and contact Christian before publishing an article. Despite his promise, Schwennesen eventually published the story without contacting Christian and without determining in his own mind if Salisbury's charges were true or false.

Specifically, with reference to the instructions which are hereafter discussed, Schwennesen testified that it occurred to him Salisbury might have signed a false statement. Schwennesen testified under oath that he knew Christian could shed light on the charges of "theft", "coverup" and "harassment". Despite this fact, Schwennesen failed to interview Christian, although Christian was available and willing to be interviewed. Christian testified at the trial that the charges made by Salisbury were without merit and that he would have so advised Schwennesen had he been contacted by Schwennesen prior to publication.

Eckerson, the man who lost his "smoker" in 1974, attempted to dissuade Schwennesen from printing an article. Eckerson told Schwennesen the story was "garbage" which should not be published and further advised Schwennesen that *The Missoulian* would be sued for publishing the article. Despite Eckerson's misgivings,

Schwennesen informed Eckerson that the story would be published no matter what he said.

With this evidence before the jury, although disputed, the District Judge gave the following three instructions:

INSTRUCTION NO. 11

As a matter of law, Plaintiff is a public official, and the newspaper article in question concerned his official conduct. As such, he may not recover against either Defendant unless he proves that the newspaper article was false, unprivileged, and defamatory, and that it was published with malice, that is, with knowledge that it was false, or with a reckless disregard of the truth.

INSTRUCTION NO. 12

The term "reckless disregard of the truth," as used in these instructions, does not mean mere negligence, or even gross negligence or wanton conduct. Rather, it means publishing an article with a high degree of awareness of its probable falsity, or that the Defendants, in fact, entertained serious doubts as to the truth of the publication.

INSTRUCTION NO. 13

The following are examples of the types of conduct which constitute malice in publishing a statement or allegation:

1) The story was fabricated by the Defendant; or,

2) The story was the product of the Defendants' imagination; or,

3) The story was based wholly on an unverified and anonymous telephone call; or,

4) The story contains allegations that are so inherently improbable that only a reckless person would put them into circulation; or,

5) The story was published despite obvious reasons to doubt the veracity of the informant upon whom the article was based, or to doubt the accuracy of his reports.

This list is provided to aid you in determining whether malice has been shown by the evidence in this case. By providing it, the Court does not mean to suggest that the list is all-encompassing and therefore exclusive, nor does it suggest that the evidence supports or does not support the presence of any such conduct in this case.

Instruction No. 11 is taken from New York Times Co. v. Sullivan, *supra*. The instruction is a correct statement of the law. Instruction No. 12 is fatally defective in that it defines "reckless disregard of the truth", as used in Instruction No. 11, as being equivalent to having serious doubts about the truth of the statement. Instruction No. 13 is erroneous in that it seeks to itemize instances of malice to the exclusion of other instances which may not have occurred to the District Judge. Lists such as the one set forth in Instruction No. 13 are seldom appropriate.

The effect of Instruction No. 12 is to shield a newspaper where it knows that the source of its information is highly suspect but fails to investigate. The newspaper is shielded because it failed to investigate and find out that certain information was false, choosing rather to close its eyes and publish with no actual serious doubts about the falsity of the material. Such a rule encourages irresponsible journalism. When a newspaper has facts that indicate material is highly suspect, it should, and it does, have a duty to investigate before publishing.

Instruction No. 11 correctly stated the law. A newspaper is only liable for malice where it publishes with

knowledge of falsity or with a reckless disregard of the truth.

The erroneous instructions may well have influenced the outcome of this case. Schwennesen and his editor had reason to believe that Salisbury's statement was highly suspect. Schwennesen failed to interview Christian, who would have told him that the statement was without any substance or merit. *The Missoulian* published Salisbury's statement without fully investigating and therefore, without actually knowing the statement was false. Under the instructions of the court, the jury could have found that *The Missoulian* was reckless in failing to investigate but nevertheless found there was no malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement. Upon remand, the court will instruct upon the proper standard without embellishment.

Appellant further raises error in the District Court's ruling which applied the "shield law" to protect Schwennesen's notes. Generally, a reporter's sources are privileged. The applicable statutes are found in the "Media Confidentiality Act", §§ 26-1-901, et seq., MCA. Section 26-1-902, MCA, provides:

> (1) Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.
>
> (2) A person described in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to

> issue subpoenas for refusing to disclose or produce the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his or its business.

The above-quoted statute protects a reporter's sources. Schwennesen's notes were shielded by this statute until he took the witness stand or testified by way of deposition. Section 26-1-903(2), MCA, provides:

> (2) If the person claiming the privilege voluntarily offers to testify or to produce the source, with or without having been subpoenaed or ordered to testify or produce the source, before a judicial, legislative, administrative, or other body having the power to issue subpoenas or judicially enforceable orders, he or it waives the provisions of 26-1-902.

Under this provision, Schwennesen waived his privilege to keep his notes confidential. Upon retrial the notes are subject to discovery if Schwennesen testifies.

Judgment in favor of *The Missoulian* is vacated. The case is remanded for a new trial in accordance with the views herein expressed.

/s/ Frank B. Morrison, Jr.
Justice

We concur:

/s/ J. A. Turnage
Chief Justice

/s/ Fred J. Weber

/s/ John Conway Harrison

/s/ L. C. Gulbrandson

/s/ John C. Sheehy
Justices

Mr. Justice William E. Hunt, Sr., concurring:

I concur with the majority opinion concerning the jury instructions given by the Court and I concur in the reversal of the action on that basis. However, I do not agree with the majority that the facts are as clear as they present them.

My review of the record indicates that the article contains errors and omissions, and in the final analysis proved to be false. However, the fact that the article ultimately proved to be false does not change my belief that Sible has failed to clearly and convincingly prove that the article was published with actual malice. As stated in New York Times Co. v. Sullivan (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686.

> The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and belief which are offered." (Citation omitted.)
>
> [E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive . . ." (Citation omitted.)

376 U.S. at 271-72, 84 S.Ct. at 721, 11 L.Ed.2d at 701.

Montana is also committed to the notion that freedom of expression should be as broad and unfettered as possible recognizing such freedom must be weighed against an individual's right of privacy and reputation. 1972 Mont. Const., Art. II, § 7; Cox v. Lee Enterprises (Mont. 1986), 723 P.2d 238, 43 St.Rep. 1476.

Sible raises a number of errors and omissions in the article, but especially finds fault with respondents' failure to adequately investigate the story, and with the use of the words "theft" and "coverup." Investigatory failures alone are insufficient to establish reckless disregard of the truth. Instead, Sible must show that the respondents' conduct was highly unreasonable and constituted "an

extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co. v. Butts (1967), 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111.

Here, while respondents' investigation could have been more thorough, it was not so unreasonable as to constitute an extreme departure from responsible publishing standards.

Prior to his work on this story, Schwennesen had never met Salisbury, and knew Sible only by appearance. Sible testified he did not believe Schwennesen or anyone else at *The Missoulian* was "out to get him." Schwennesen interviewed all the major participants involved except one, a deputy named Christian. He attempted to contact Christian twice but he was on vacation. Schwennesen did not contact Christian after he returned from vacation because by that time, Sible had admitted to Schwennesen that he had the smoker. *The Missoulian* also consulted with its legal counsel prior to publication.

Schwennesen testified that Salisbury appeared to be candid, forthright, and "sincerely believed what he was telling" him. Further, Schwennesen verified the majority of facts in the story. He confirmed that the smoker was missing and that Sible admitted having it in his possession. Salisbury's investigation into the matter was authorized by Sheriff Rierson who later put Sible in charge of the detective division. Salisbury's subsequent reprimand, transfer to patrol, and ultimate resignation were verifiable facts. I do not agree that respondents' investigatory failures were so extreme as to amount to reckless disregard of the truth.

Sible argues respondents' use of the words "theft" and "coverup" in the article constitute reckless disregard of the truth. None of the sources for the story used those words and Sible argues their use by Schwennesen

amounted to fabrication and publication of a known falsehood. I do not agree.

The owner of the smoker, Eckerson, told Schwennesen that he had seen a smoker that looked like his on property he believed to be Sible's. Eckerson further testified that he thought Sible had taken his smoker, but did not want to make an issue of it. In Salisbury's notarized statement which Schwennesen read, he states that a man, Eckerson, told him Sible "stole his smokehouse." Salisbury went to Sible's residence and "located the smokehouse." Although no one used the word "theft," it was implied from the statements and interviews Schwennesen had prior to publication.

The use of the word "coverup" derived from the fact that after Sible was placed in charge of the detective division, Salisbury was reprimanded for failure to solve cases and his demeanor with female complainants. He later transferred to the patrol division and ultimately resigned.

I do not agree that respondents acted in reckless disregard of the truth in using the words "theft" and "coverup." Instead, the article was based upon interviews with the major participants and probable conclusions from verified facts.

Furthermore, I do not believe Schwennesen waived his shield law as set out in § 26-1-902, MCA, by taking the stand.

Schwennesen was named defendant in this action. He did not file a counterclaim or a cross-claim, but did take the stand in his own defense. He testified in great detail as to the circumstances involving preparation of the article. However, at no time did Schwennesen offer to introduce any portion of his notes into evidence, nor did he refer to his notes in his testimony to refresh his recollection or bolster his testimony. I cannot agree that Schwennesen ever "voluntarily offered" to produce or testify concerning the contents of his notes.

The case of Lal v. CBS, Inc. (E.D.Pa. 1982), 551 F. Supp. 364, *Aff'd* (1984), 726 F.2d 97 is similar. In that case, a federal district court judge held a reporter's notes privileged under Pennsylvania's shield law even though the reporter had already revealed her primary sources. In this case, Schwennesen revealed his sources and testified concerning preparation of the article. He did not voluntarily testify concerning his notes or their contents.

Section 26-1-902, MCA, was written to encourage a free and dynamic press by protecting journalists and related media personnel from compelled disclosure of sources and confidential information. It is our duty to uphold legislative intent whenever possible. Therefore, I would conclude that the District Court was correct in refusing to compel production of Schwennesen's notes.

Because I agree that the jury was not properly instructed as to actual malice, I concur with the majority in reversing and remanding for new trial.

/s/ William E. Hunt, Sr.

APPENDIX B

IN THE DISTRICT COURT
OF THE ELEVENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DV-83-076

WARREN E. SIBLE,
Plaintiff,

vs.

LEE ENTERPRISES, INC., an Iowa corporation,
DONALD SCHWENNESEN and MAX SALISBURY,
Defendants.

JUDGMENT ON VERDICT

This matter came regularly on for trial before the Court sitting with a jury November 5, 1984. Plaintiff was represented by Alan J. Lerner, Esq. Defendants Lee Enterprises, Inc. and Donald Schwennesen were represented by Harold V. Dye, Esq. Witnesses testified and exhibits were received into evidence.

Thereafter on December 5, 1984, the matter was submitted to the jury which returned the following verdict, to wit: We the jury eight or more of our number find in this cause as follows:

1. Has the Plaintiff proved by a preponderance of the evidence that the newspaper article in question was false, unprivileged, and defamatory?

Yes X No

2. Has the Plaintiff proven by clear and convincing evidence that the newspaper article was published by

Defendants Don Schwennesen and Lee Enterprises, Inc. with "actual malice" that is knowing it was false or in reckless disregard of whether it was true or false?

Yes No X

DATED this 5th day of December, 1984.

/s/ Beth Burren,
Foreperson

On the basis of the foregoing verdict,

IT IS ORDERED and ADJUDGED that Plaintiff take nothing by his Complaint and that Defendants Lee Enterprises, Inc. and Donald Schwennesen recover their costs herein expended as allowed by the Court.

DATED this 14th day of December, 1984.

/s/ Michael H. Keedy
District Judge

LG71

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 85-181

WARREN E. SIBLE,
Plaintiff and Appellant,

v.

LEE ENTERPRISES, INC., an Iowa corporation; DONALD SCHWENNESEN; and MAX SALISBURY,
Cross-Claimants and Respondents.

ORDER

[Filed Jan. 13, 1987]

The petition for rehearing is denied.

DATED this 13th day of January, 1987.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Frank B. Morrison, Jr.

/s/ Fred J. Weber

/s/ L. C. Gulbrandson

/s/ John C. Sheehy
Justices

Mr. Justice William E. Hunt, Sr., would grant a rehearing.

APPENDIX D

Western Montana
Missoulian, Wednesday, December 29, 1982 Page 16

EX-DETECTIVE ACCUSES
FLATHEAD COUNTY SHERIFF
OF COVERUP, HARASSMENT [1]

Dispute centers on stalled theft probe

(First of two parts)

By DON SCHWENNESEN
of the Missoulian

KALISPELL—A former Flathead County sheriff's detective has charged that his investigation of a theft involving a fellow officer was covered up by outgoing Sheriff Al Rierson, who then harassed him until he quit the department.

Max Salisbury outlined his charges in a written, notarized statement prepared in October when six others filed complaints of intimidation against the sheriff.

His statement did not go to County Attorney Ted Lympus, but was given to Gov. Ted Schwinden in October. Schwinden's office is not investigating the charge.

The incident involves a meat smoker belonging to a former state game warden, who said it was stolen in 1975.

Both Rierson and Lt. Warren Sible, who wound up with the smoker, deny there was any wrongdoing within the department.

Rierson said the investigation results went to the county attorney but no action was ever taken. He said

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[1] This article was published in The Missoulian, Dec. 29, 1982, at 16, col. 1. A photograph of Sheriff Rierson was published alongside this article, with the caption "Flathead County Sheriff Al Rierson denies wrongdoing."

Salisbury was angry because he was ordered out of the detective division and back to the patrol division due to poor performance as a detective.

Sible said he obtained the smoker from a man now deceased, who had received it as a gift from the former warden.

But the warden says he never gave it to anyone and never knew the man who supposedly gave it to Sible.

Salisbury says he began investigating the theft in early 1981, after a chance encounter with the retired warden during which the man claimed Sible had stolen his smoker.

Salisbury says he began investigating the complaint after being advised by his detective supervisor Bob Soderstrom and by Rierson to treat the case like any other one.

He and a fellow deputy located the smoker, which had been repainted, at Sible's residence. They photographed it and submitted an initial report.

But then, when Salisbury's detective supervisor quit the department, Rierson put Sible in charge of the detective division and hence of the investigation.

Salisbury said about the same time he also began receiving a larger number of dead-end cases to investigate, cases where there were no leads and no witnesses.

Next, Salisbury says, Sible wrote a memo criticizing him for his "apparent shortcomings" in failing to solve more cases.

Previously, Salisbury had won praise for his work in the probe that led to the conviction of J.R. Fletcher for the Polebridge murder of Roy Cooper.

The memo also criticized Salisbury's "demeanor with female complainants" because of two earlier incidents in which he was seen with a woman in a county car in Woodland Park.

Salisbury said he had accompanied the woman at court request, and with the authorization of his former detective supervisor, to ensure that the woman's estranged husband did not attempt to abduct their child during visitation periods.

The former husband also was aware that he was under surveillance, Salisbury added.

Later, Salisbury said, Rierson removed him from detective duty and returned him to patrol duty, ostensibly as part of a program to refresh all the detectives with patrol work.

But Salisbury said he was the only detective who was reassigned to patrol work.

Salisbury's statement adds that at one point, Rierson hauled him in for a meeting at which Deputy Doris Stahnke took notes while the sheriff chewed him out.

According to Salisbury, the sheriff said he'd "heard rumors" that Salibury was calling for a grand jury investigation of the department by the attorney general.

Salisbury, who now works as a security guard and private investigator, said he quit the department in August, 1981.

"I couldn't believe this was happening to me," he said.

Rierson and Sible said the charges were lies and added that they would prosecute both Salisbury and the Missoulian for slander and libel if the smoker story is published.

Sible said the incident occurred 14 years ago when he and a friend were hunting in the Echo Lake area and came across some property for sale. The smoker was on the property, Sible said, and he commented about it to his friend.

Sible said his friend, who owned a Bigfork tavern at the time, said he thought he knew the owner of the smoker as one of his patrons.

Later, Sible said he phoned a number posted on the property for sale but could only reach the warden's ex-wife.

Subsequently, he said, his friend obtained the smoker, built one similar to it, and gave the original to Sible.

But the game warden, contacted by the Missoulian, says he never knew Sible's friend and was only in the man's tavern once.

"It was full of hippies, so I never went back," he said.

(Picture and Caption Omitted in Printing)

He also said he didn't own the smoker or the property described by Sible 14 years ago.

He maintained that the smoker had been taken from his property illegally in 1975. He said he got Sible's name from his ex-wife and later saw his smoker in Sible's yard when he went to ask the deputy about the matter.

He said no one appeared to be home the day he visited Sible's residence.

He said he complained about the incident at the time, to Sible, Rierson and anyone else who would listen.

"I think everyone in town was aware of it, because I was pretty vocal about it," he said.

But he said he was hoping for disciplinary action and decided not to press criminal charges because he didn't think the smoker was valuable enough to cost a deputy his career.

He said he told Rierson that the sheriff "had a personnel problem. He got pretty hotty about that," the former warden added, observing that Rierson didn't take criticism very well.

"I told him also that I didn't want to hear any more about it," the former warden said.

He said he was no longer angry about the incident and did not want to reopen it now because he is suffering from high blood pressure.

The five-year limit for prosecuting the case has already run out under the statute of limitation. He said when he encountered Salisbury in 1981, it was the former detective who asked about the smoker incident. He said he was reluctant to volunteer information about it but was told it was one of several incidents involving Sible that were under investigation.

Later, he said, he became worried that his smoker case was the only incident involving Sible. He was afraid his case might be part of a personal feud between Salisbury and Sible.

"I don't like getting involved in anyone's vendetta," he said. "I like to keep things on course."

Salisbury said he is aware of other incidents but could not comment on them because he had no direct knowledge of them.

A secretary to the Flathead County attorney said that office received an investigation report on the smoker case in 1981, but sent it back to the sheriff's department for more work. It never came back, she said.

She also confirmed that an investigation of a stolen saddle, whose disappearance was linked to Sible, was also returned to the sheriff's department for more work. That never came back, either, she said.

Salisbury says Rierson never told him the smoker case was settled, and the game warden never got an explanation of what happened to his smoker.

Instead, Salisbury believes his own efforts to investigate the matter eventually cost him his nine-year career with the department, by forcing him to decide whether to resign or work for people who appeared to be involved in a coverup of improper action.

Rierson said the warden could never make positive identification of the smoker, although he confirmed it looked like his smoker.

Rierson said if Salisbury did not learn the outcome of the smoker case, it is because detectives are not generally given that information. Salisbury disputed the sheriff's remark and said detectives usually learn the outcome of their cases.

Rierson said without identifying marks, it is almost impossible to prove the true ownership of stolen property to the satisfaction of a judge.

"Unless we have positive proof . . . you've got nothing to hang your hat on," he said.

"We've had to return stolen property to the thief because the owner couldn't prove it was his," Rierson said.

STATE STILL
HASN'T CHECKED
ON ALLEGATIONS [2]

By DON SCHWENNESEN
of the Missoulian

The state has not investigated a former Flathead County detective's statement detailing problems he encountered while trying to probe an alleged theft involving a fellow officer.

Due to a misunderstanding, Max Salisbury's statement was not among six filed with Flathead County Attorney Ted Lympus in October and referred to the state attorney general.

However, his statement and others reportedly were handed to Gov. Ted Schwinden during a private meeting in Kalispell early in October.

Salisbury's statement indicates that he was harassed until he quit the department after he began looking into the disappearance of a meat smoker that ended up in the possession of another deputy (see related story).

The other statements filed Oct. 13 charge that outgoing Sheriff Al Rierson intimidated four deputies and a former deputy because they failed to support him in his unsuccessful re-election campaign against Deputy Chuck Rhodes.

A spokesman for Schwinden confirmed recently that the governor received several statements in early October while in Kalispell on an official visit.

According to David Wanzenried, the governor's executive assistant, Schwinden met in October with "an officer and a private citizen in Kalispell, at their request."

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[2] This article was published in The Missoulian, Dec. 29, 1982, at 16, col. 6, immediately to the right of the article reproduced above.

During the meeting, he said, "a number of verbal allegations were made against Rierson" and several documents were given to Schwinden.

But Wanzenried said the governor advised that any written charges be given to the county attorney for proper investigation.

"The governor made it clear that the agency responsible" for mounting an investigation "was not the governor's office, nor would he serve as a mailman."

Six statements were later given to Lympus, who forwarded them to Attorney General Mike Greely. Greely's office has since passed them on to Jack Lowe, lawyer for the commissioner of political practices, who is investigating them.

Salisbury said he was not at the Kalispell meeting with the governor, but his statement was among those given to Schwinden.

He also did not attend the initial meeting with Lympus, at which the other six complaints were filed.

But he said he met briefly with Lympus a few days later, in the Flathead County Courthouse parking lot, after the first six statements had already gone to the attorney general.

Salisbury said he was told his statement might not be necessary at that time.

"I was not that concerned," he said, since he knew his statement had gone to Schwinden. He thought the documents given to Schwinden would somehow become a part of any state investigation.

Lympus told the Missoulian he did not realize when he spoke with Salisbury that the former detective had already prepared a written notarized statement.

"If he has allegations like that, he ought to send them over the Jack Lowe," Lympus said.

Lowe declined to comment on any aspect of the investigation.

No. 86-1638

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LEE ENTERPRISES, INCORPORATED, a Delaware Corporation and DONALD SCHWENNESEN,
Petitioners,

v.

WARREN E. SIBLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Sible disagrees with the accuracy and completeness of Petitioners' Statement of the Case. Sible's Statement of the Case shall supplement the facts found in the Montana Supreme Court's majority opinion. Finally, Petitioners have ignored Schwennesen's and Mason's (his editor) testimony relative to actual malice.

Petitioners allege that the "core" of the December 29th article was Salisbury's notarized statement. This document was purportedly given to the Governor of the State of Montana by Robert Stephens. Schwennesen admitted

he knew that the statement had been prepared with the help of his personal friend, Robert Stephens. Tr. at 542. Schwennesen testified he knew Stephens disliked Sheriff Rierson's administration. Tr. at 718. More importantly, Schwennesen admitted it occurred to him that Stephens had an unjustified "axe to grind." Tr. at 718. Prior to the statement's creation, Schwennesen informed Stephens that the document was necessary for a story in the newspaper. Tr. at 700. Schwennesen knew Salisbury's statement resulted from Stephens' encouragement. Schwennesen admitted "obvious reasons" to question Stephens. Tr. at 715, 533.

Mason was aware of the genesis of the Salisbury statement before publication, having discussed Schwennesen's social relationship with Stephens and Stephens' encouragement of Salisbury. Tr. at 740. Schwennesen testified he had no prior experience with Salisbury, describing him as a "completely unknown source". Tr. a 540, 566.

Schwennesen testified that Salisbury told him to contact Christian about the truth of the charges and also said Christian would be open and honest. Tr. at 1845. Both Schwennesen and Mason knew Salisbury had misgivings about the charges and therefore had requested Christian be contacted to confirm the truth or falsity of the allegations before publication. Tr. at 836. Schwennesen admitted Salisbury stressed Christian's importance in determining the validity of the allegations. Tr. at 575. Schwennesen further told Salisbury he would carefully investigate the charges' validity before an article was published. Tr. at 659.

Salisbury's statement also accused Deputy Dale Walter of taking a coin while investigating a crime. Plaintiff's Exhibit Number 5. Christian was identified by the statement as an eye-witness to this event. *Id.* Schwennesen contacted Walter before publication about Salisbury's accusation (Tr. at 1852) and, testified that Walter's strong denial of the coin charge gave him obvious

reason to doubt the truth of Salisbury's statement. Tr. at 735, 736.

Schwennesen spoke with Sible twice before the article was published. A copy of the first conversation was taped at the Flathead County Sheriff's Office and a transcription was introduced into evidence. The transcription is attached, beginning at page 1a of the Appendix to this Brief.[1] Regarding all charges, Sible also implored Schwennesen to contact Christian before publication.

Both Schwennesen and Mason testified they were aware that both principals to this dispute requested Christian be contacted to determine the truth or falsity of Salisbury's charges. Tr. at 783, 833, 834. Schwennesen testified he had ample time to contact Christian before publication. Tr. at 1929, 1930. Mason testified that the decision not to contact Christian before publication to determine the truth or falsity of the charges was intentional. Tr. at 1964. Schwennesen testified that he and Mason had obvious reason to suspect that the two smok-

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[1] Petitioners' assertion that Sible admitted to Schwennesen in the telephone conversation that he had Eckerson's smoker is not clear from the transcript of Schwennesen's December 3rd discussion with Sible. Eckerson's name was not mentioned during that discussion. Although Sible admitted he had possession of *a smokehouse* given to him by Bob Brandewie, it was not clear that Sible, at that time, connected Eckerson's smoker to the one given him by his friend. Moreover, the transcription clearly reveals that Sible (as did Salisbury) told Schwennesen to contact Christian to verify the truth or falsity of the accusations. Thus, both principal disputants asked Schwennesen to contact the co-investigating officer on the "smoker caper" before printing Salisbury's allegations. Mark Holston, the news director of the local TV station, testified that when a reporter is asked by both principals to a dispute to contact a particular party and fails to do so, that reporter recklessly disregards the truth or falsity of the allegations under the circumstances. Tr. at 233-234, 237. Holston's testimony seems in accord with the facts, rationale and result of the Ninth Circuit's decision in *Alioto v. Cowles Communication, Inc.*, 519 F.2d 777 (9th Cir.), *cert. den.*, 96 S.Ct. 280 (1975).

ers at issue were not the same before publication. Tr. at 605, 614-616, 630-631, 737, 742, 853, 1864, 1867-1868, 1914, 1933-1934, 1953, 1965.

Petitioners testified that they had obvious reasons to doubt Salisbury's veracity and the accuracy of his charges because they questioned his motives, knew he was emtionally mixed-up and knew he was a vindictive, disgruntled ex-employee. Tr. at 540-541, 552-553, 554, 562, 566, 574-576, 614-615, 659, 673, 678, 679, 682-683, 686, 687, 695, 697, 703, 714-715, 718, 724, 729, 735, 738, 764, 838, 853, 948-952, 990-991, 1003, 1792-1793, 1823, 1842-1843, 1845, 1852-1853, 1862, 1864, 1900.

Schwennesen and Mason never formed a good faith belief that Salisbury's charges were true, in spite of questioning the validity of those charges. *Id.*, see also, Tr. at 695. Schwennesen and Mason discussed the story and concluded that,

> "[W]ell, Max Salisubry had raised a lot of questions for Don that he wanted time to check out and we agreed that there was no need to get [the article] into the paper [immediately] and that it was *important* to talk to some of the *other people*".

Tr. at 1952. (Emphasis added). Despite Schwennesen's concerns and the warnings from his source and Sible to contact John Christian about the truth or falsity of the charges, Schwennesen made a purposeful decision not to contact Christian.

Contrary to Petitioners' assertion, the facts contained in the Montana Supreme Court's majority opinion are supported by the record, including Schwennesen's and Mason's testimony. The record in this case is extensive. It is beyond the scope of this Statement of the Case to set forth all facts supporting actual malice in complete detail. With the testimony and admissions of Schwennesen and Mason before it, the Montana Supreme Court

rendered its opinion which remanded this case for a new trial.

Petitioners contend in footnote number 3 that Sible does not dispute the accuracy of Schwennesen's reporting. This is a misstatement. Sible disputes Schwennesen's accuracy in reporting the contents of Salisbury's statement.

Petitioners' Statement of the Case also omits several of Sible's theories of actual malice. In addition to those theories set forth in footnote number 8, Sible also argued publication of a *known falsehood* because the article claimed Sible was put in charge of his own investigation and therefore implied that he was actually aware of the investigation while it was ongoing. See Brief of Appellant at 37-40. More importantly, the Petitioners have neglected to inform this Court that Sible argued a theory of actual malice from Schwennesen's testimony that he had "obvious reasons" to doubt Salisbury's truthfulness and the accuracy of Salisbury's report. *Id.* at 42-43. Sible's theory was therefore based directly on *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968). Finally, Sible's theory of actual malice included Schwennesen's intentional failure to cross-check the allegations with Christian after being informed to do so by his source. The theory of actual malice presented in this respect is set forth in *Alioto v. Cowles Communication, Inc.*, 519 F.2d 777 (9th Cir.), *cert. den.*, 96 S.Ct. 280 (1975) and is buttressed by the Colorado Supreme Court's decision in *Kuhn v. Tribune-Republican Pub. Co.*, 637 P.2d 315 (Colo., 1981).

Under the backdrop of this record, the Montana Supreme Court reversed and remanded this case for a new trial on two grounds. The Montana Supreme Court held that the jury instructions were defective and that Schwennesen's failure to produce his notes under the

Montana "Shield Law" was prejudicial to Sible's case on actual malice.[2]

ARGUMENT

I. THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI BASED ON THE NECESSITY OF A RETRIAL TO EXAMINE SCHWENNESEN'S NOTES AND THEIR EFFECT.

The Montana Supreme Court noted Petitioners and Sible raised many issues but only two were dispositive. One of the dispositive issues related to a matter of pure state law—whether Schwennesen's notes were protected by Montana's "Shield Law".

In *Herbert v. Lando*, 441 U.S. 153 (1979), this Court held that it would not impose an additional First Amendment restriction on discovery in public official libel cases.[3]

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[2] Petitioners concede in footnote number 10 that the Montana "Shield Law" question is relevant to a determination of actual malice. Schwennesen's notes are relevant to what he actually knew at the time of publication. Such information bears on Schwennesen's publication of material known to him to be false or his reckless disregard of the truth under known facts. Whether or not Schwennesen's notes were protected, however, is purely a matter of state law as it applies to this Petition. In *Herbert v. Lando*, 441 U.S. 153 (1979) this Court refused to extend a First Amendment privilege to discovery matters similar to the one at issue. Consequently, the Montana Supreme Court was free to hold that Schwennesen's notes were not protected under our "Shield Law" privilege. The result of this holding is that this case will have to be retried on the question of actual malice because the record is incomplete. Sible has a right to review Schwennesen's notes and question him about them before a jury. Since Sible was denied proper discovery by the district court's error in the first trial, a new trial on the question is required. Consequently, this record is not yet ready for this Court's review.

[3] Sible has consistently contested being designated as a public official for purposes of the theft of the smokehouse charge. Sible continues to contest such designation. However, for purposes of the discussion of this Brief, Sible will assume, *arguendo*, that he

In *Herbert v. Lando*, this Court recognized the importance of demonstrating that a defamer had "reason to suspect his publication was false" to establishing actual malice. 441 at 152.

To establish actual malice, the knowledge of the defamer at the time of publication is critical. A libel plaintiff must be able to determine what the defamer knew at that time to prove the defamer made a knowingly false statement or recklessly disregarded the truth. The Petitioners have rightly not argued that the Montana Supreme Court erred in its determination under Montana's "Shield Law" as a matter of Constitutional Law. Consequently, Sible did not have vital discovery information before him necessary to his proof of actual malice. The Montana Supreme Court remanded this case for a new trial based on that lack of information. Since the information contained in Schwennesen's notes and an examination of Schwennesen about that information is extremely important to any jury's determination of actual malice, this case will have to be retried.

Thus, a new record on actual malice will be generated. Sible has the right to examine Schwennesen's notes and to question that reporter about them. We do not know what the notes show. It is entirely conceivable that the notes will demonstrate Schwennesen actually knew Salisbury's statement was false, but decided to unjustifiably assassinate Sible's character anyway.

As a result of the trial court's error in not allowing Sible to examine Schwennesen's notes during the first trial, the record on actual malice which will eventually determine the outcome of this case will be changed. In other words, this Court does not now have before it a final record. For this reason alone, the Petition for a Writ of Certiorari should be denied.

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is an "all purpose public official", required to prove actual malice to recover any damages under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

II. THIS COURT SHOULD NOT REINSTATE THE JUDGMENT IN FAVOR OF PETITIONERS, SUMMARILY OR OTHERWISE.

As noted in the preceding section of this Brief, the Montana Supreme Court was free to determine that our state "Shield Law" was incorrectly applied by the trial court and resulted in Sible being improperly denied access to Schwennesen's notes. Since the First Amendment does not preclude such a decision, and because those notes are extremely relevant to the question of actual malice, a retrial must occur in any event. If this Court were to accept Petitioners' suggestion of complete reversal and reinstate the judgment in Petitioners' favor, this Court would not only encroach on areas left to the states but would erode its holding in *Herbert v. Lando*. By implication, a reversal which reinstated the judgment of the trial court without a new trial would hold that reporters' notes are protected from scrutiny even where state law does not grant such a privilege in a particular case.

Petitioners' suggestion would also deny Sible his due process right to fully present his case to a jury because evidence to which he is entitled would be denied him. Thus, Petitioners' suggestion that this Court reinstate the trial court's judgment without a new trial is extremely inappropriate and disregards Montana's right to determine what evidentiary privileges shall be extended to a reporter in a defamation case.

III. THE MONTANA SUPREME COURT ACCORDED INDEPENDENT REVIEW ON THE ISSUE OF ACTUAL MALICE.

As Petitioners correctly noted, it was Sible (not them) who directed the Montana Supreme Court's attention to their duty under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). *Bose* requires a reviewing court to make its own independent judgment on the rec-

ord to determine if actual malice with convincing clarity is or can be present.

Sible maintains that this is exactly what the Montana Supreme Court did in this case. As the opinions clearly demonstrate, the Montana Supreme Court's majority version of the facts conflicts with those set forth by Justice Hunt in his opinion, which concurs in the reversal. It is submitted that the diversity of the presentation of the facts from the two opinions evidence an independent review of the actual malice question as required by *Bose*. Justice Hunt even states in his concurring opinion:

> "I concur with the majority opinion concerning the jury instructions given by the Court and I concur in the reversal of the action on that basis. However, I do not agree with the majority that *the facts are as clear as they present them.*"

Petitioners' Appendix at 9a. (Emphasis added). This diversity of opinion regarding the facts establishes that an independent review of the record on actual malice did occur. For this reason, Petitioners' suggestion that the Montana Supreme Court failed in its constitutional duty is without merit.

The Petitioners have also suggested error under *Bose* because, in the context of examining a jury determination to see if Plaintiff's case was presented properly by the instructions, the Montana Supreme Court reviewed the evidence "in a light most favorable to the Appellant [Plaintiff]". Petitioners apparently suggest that the application of any presumption is foreclosed by *Bose* in an appellate court's review of the record on the ultimate Constitutional issue of actual malice.

This Court's recent decision in *Anderson v. Liberty Lobby, Inc.*, 466 U.S. 485, 106 S.Ct. 2505 (1986) would militate against the conclusion that an appellate court cannot apply any presumptions in conducting a review of the record on actual malice to determine if the jury was properly instructed. In delivering the Opinion of this

Court, Justice White reasoned that the "clear and convincing" standard of evidentiary proof must be considered in determining whether summary judgment should be granted in a public official libel case on the actual malice issue. Justice White further observed, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". 106 Sup.Ct. at 2513.

When reviewing jury instructions, a court must determine if the plaintiff's case was properly presented to the jury. The inquiry is akin to whether or not the plaintiff can sustain his case on consideration of a motion for summary judgment. Applying *Anderson*, the Montana Supreme Court was free to view the evidence in a light favorable to Sible. Contrary to Petitioners' assertion, the obligation of "independent review" is still tempered with traditional presumptions and inferences as is demonstrated by Justice White's observation that in actual malice summary judgment motions, the evidence must still be viewed in the traditional light favoring the non-movant.

Most importantly, however, the Montana Supreme Court's majority version of the facts is fully supported by the record. That version, and the conclusion that Petitioners knew Salisbury's charges were highly suspect, is supported by Schwennesen's and Mason's testimony at trial.[4]

Consequently, the Montana Supreme Court did conduct an independent review of the record. Moreover, being cognizant of this Court's mandates in *Bose* and *Anderson*, the Montana Supreme Court concluded, by implication, that sufficient evidence exists in the record for a reason-

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[4] Indeed, based on the admissions and testimony of Schwennesen and Mason, Sible argued to the Montana Supreme Court that actual malice was established by the Petitioners' testimony as a matter of law. Brief of Appellant at 32-54.

able and properly instructed jury to find that Sible has established actual malice with convincing clarity.

The Montana Supreme Court's review of this record supports the conclusion that Petitioners knew Salisbury's charges were "highly suspect". The underlying facts of that conclusion are not "imagined" as Petitioners suggest on page 8 of their Brief but are rather based on Schwennesen's and Mason's admissions and testimony. This Court should deny the Petition for a Writ of Certiorari.

IV. THE MONTANA SUPREME COURT'S OPINION IS CONSISTENT WITH *ST. AMANT* v. *THOMPSON*.

A public official libel plaintiff must prove actual malice, in addition to all elements under state law, to recover damages. The First Amendment requirement that actual malice be demonstrated was, of course, set forth in this Court's landmark decision in *New York Times Co. v. Sullivan*, 378 U.S. 254 (1964).[5] The element of actual malice simply means that a public official plaintiff cannot recover for libel unless he demonstrates with con-

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[5] In his Brief opposing a rehearing by the Montana Supreme Court, Sible suggested that it was time for this Court to re-examine its decision in *New York Times Co. v. Sullivan*. Although Sible feels that a re-examination of the *New York Times Co.* actual malice rule would be premature in this case at this time (the record in this case being insufficiently developed without a retrial which includes the opportunity to examine Schwennesen's notes and question him regarding the same), Sible wishes to preserve, throughout this case, his position that the actual malice rule of *New York Times Co.* should be re-examined and possibly overruled by this Court, allowing public officials to constitutionally recover damages under traditional concepts of defamation. Since this case will have to be remanded for retrial because of the district court's error which improperly denied Sible discovery of Schwennesen's notes and the opportunity to examine him regarding the same as a matter of state law, Sible has declined at this time to file a Cross-Petition for a Writ of Certiorari on this question.

vincing clarity that the defamer published a known falsehood or recklessly disregarded the truth or falsity of his publication.

Contrary to Petitioners' assertion, this Court's decision in *St. Amant v. Thompson*, 390 U.S. 727 (1968) did not require Instruction number 12 to be given because that instruction elaborates on the element of actual malice and is therefore prone to confuse the jury. Justice White recognized that reckless disregard in a First Amendment context "cannot be fully encompassed in one infallible definition" in *St. Amant.* 360 U.S. 730.

For instance, in *Alioto v. Cowles Communications, Inc.*, the Ninth Circuit concluded that actual malice could be inferred from the authors' intentional decision not to contact a key source from whom they might have learned that the statements they made about Alioto were false.

The question before this Court is not whether the Montana Supreme Court overruled *St. Amant.* The question is whether a jury must be instructed in all refinements of the law of actual malice.

The Montana Supreme Court reaffirmed the rule in *New York Times Co.* The Montana Supreme Court held that Sible must establish actual malice with convincing clarity to recover in this action. However, the Montana Supreme Court correctly noted that Instructions numbers 12 and 13 confused the jury. Neither instruction sets forth the definition of actual malice, which is simply publishing a known falsehood or recklessly disregarding the truth. In other words, by adding the elaboration through the instructions, the Montana Supreme Court concluded that the jury could become confused about what actual malice meant.

The Petitioners have failed to realize the true meaning of the Montana Supreme Court's Opinion. The operative paragraph of the Opinion is:

> "The erroneous instructions may very well have influenced the outcome of this case. Schwennesen and his editor *had reason to believe* that Salisbury's statement *was highly suspect.* Schwennesen failed to interview Christian, who would have told him that *the statement was without any substance or merit. The Missoulian* published Salisbury's statement *without fully investigating* and therefore, without *actually knowing* the statement was false. Under the instructions of the court, the jury could have found that *The Missoulian was reckless in failing to investigate* but nevertheless found there was no malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement. Upon remand, the court will instruct upon the proper standard *without embellishment.*"

Petitioners' Appendix at 7a. (Emphasis added).

What the Montana Supreme Court was saying with this reasoning is that many types of conduct may constitute actual malice under the circumstances of a particular case, and a jury can (and did in this case) become confused by embellishment on the proper standard. This case presents an analogous situation to *Alioto v. Cowles Communications, Inc.* The record demonstrates that Schwennesen had every reason to believe that Salisbury's statement was suspect. Both Salisbury and Sible told Schwennesen that Christian would confirm or deny the truth or falsity of Salisbury's charges. Schwennesen purposely and deliberately decided not to contact Christian even though he could have done so. Schwennesen therefore did not directly learn that the statement was false. However, his purposeful disregard of both his source's and his target's warnings to contact the man who could shed light on the truth or falsity of the article constitutes reckless disregard for the truth.

The Montana Supreme Court's formulation of the *New York Times Co.* rule of actual malice as a non-confusing jury instruction is based on a rationale which is com-

pletely consistent with *St. Amant v. Thompson.* The language of *St. Amant* indicates that where a newspaper's source is highly suspect or the newspaper has good reason to suspect that the charges it is intending to publish are false or inaccurate, publishing without investigating the charge is actual malice because the publisher is put on notice of probable falsity. When the publisher ignores such notice, his actions constitute reckless disregard for the truth or falsity of the charge.

The problem with the trial court's instructions was that they confused the jury and resulted in an erroneous verdict on the Constitutional element. Sible argued that if Instructions numbers 12 and 13 were to be included the trial court should also give an instruction based on *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) and *Alioto v. Cowles Communications, Inc.*,[6] to prevent the jury from being confused into thinking that actual malice was precluded by Sible's case.

The Montana Supreme Court saw the confusion of the jury and held that the phrasing of Instructions numbers 12 and 13 might have allowed the jury to conclude that the law *required* them to find that actual malice did not exist, where the newspaper knew its source and information were highly suspect but, published without investigating and therefore with reckless disregard under the circumstances. Contrary to their assertion, Petitioners' construction flies in the face of *St. Amant.* Where a newspaper has obvious reason to suspect the veracity of its source and the accuracy of his report and publishes without an investigation which includes contacting the one person whom both the source and the target state can verify the truth or confirm the falsity of the charges,

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[6] This Court's attention is also again directed to *Kuhn v. Tribune-Republican Publishing Co.,* 637 P.2d 315 (Colo., 1981). The facts of that case, where actual malice was found to be demonstrated with convincing clarity, are akin to the facts of Sible's case.

that newspaper acts with actual malice under the *New York Times Co.* standard.

Consequently, the opinion of the Montana Supreme Court is in accord with the requirements of *St. Amant.* The Petition for a Writ of Certiorari should be denied.

V. THE PETITIONERS' ARGUMENT THAT ACTUAL MALICE UNDER THE RECORD NOW BEFORE THIS COURT CANNOT BE DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE IS PREMATURE.

The Montana Supreme Court obviously did not see this case and record in the same light as the Petitioners have represented it to this Court. What is more surprising is that Petitioners suggest that this Court summarily conclude that clear and convincing evidence of actual malice is lacking and thereby deny Sible a new trial. The absurdity of Petitioners' contention in this regard is apparent. On one hand, Petitioners argue that independent review of the record is required under *Bose* and, on the other hand, Petitioners argue that this Court ought to disregard its decision in that case and rule merely on Petitioners' Brief.

Obviously, Sible feels the record conclusively demonstrates actual malice based on the clearest and most convincing evidence possible—Schwennesen's and Mason's testimony at the trial. However, the Petitioners have missed the point and the effect of the Montana Supreme Court's ruling on the "Shield Law". The effect is, of course, that this case will have to be retried because of a discovery error and, therefore, we do not yet have a final record on the issue.

After Sible has obtained Schwennesen's notes and has an opportunity to question him about them, this Court may have a completely different record regarding actual malice. We do not know what the impact of Sible's additional inquiry will be on a jury or the record.

Sible will not argue those record facts which establish actual malice with convincing clarity out of Schwennesen's and Mason's mouths in this Brief opposing the Petition for a Writ of Certiorari. Such an argument would be premature. The record will be changed by evidence and testimony adduced after Schwennesen's notes are examined. Consequently, the Petitioners' argument that malice cannot be shown in this case by clear and convincing evidence is, at the very least, premature. This Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

For reasons stated herein, this case is not ready for this Court's review. This case will have to be retried because, as a matter of Montana law, the trial court improperly denied Sible access to important, discoverable information on the actual malice question. Consequently, the record is not complete on the Constitutional issue.

Further, the Montana Supreme Court did not err in requiring the jury to be instructed that actual malice under *New York Times Co.* is publishing with knowledge that the charges are false or with reckless disregard for the truth or falsity of the report. The Montana Supreme Court was correct in holding that the trial court's embellishment on the *New York Times Co.* standard confused the jury. The Montana Supreme Court's formulation of the actual malice rule in the context of this case is in accord with *St. Amant v. Thompson.*

Finally, a reading of the full opinion of the Montana Supreme Court clearly establishes that it conducted an independent review of the actual malice question. The standard used by the Montana Supreme Court to conduct that review is in accord with this Court's Opinions in *Bose* and *Anderson.* Although the Petitioners would like this Court to believe that the Montana Supreme Court "blindly accept[ed] the plaintiff's version of the facts", [Petition for Writ of Certiorari at 9], most of those facts

are taken directly from the admissions and testimony of Schwennesen and Mason at trial. The majority opinion of the Montana Supreme Court conducted an independent review and concluded the record in this case can establish actual malice with convincing clarity.

Respondent Sible respectfully urges this Court to deny the Petition for a Writ of Certiorari for reasons set forth in this Brief.

Respectfully submitted this 27th day of May, 1987.

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APPENDIX

APPENDIX

TRANSCRIPTION OF TAPED PHONE INTERVIEW BETWEEN DON SCHWENNESEN AND WARREN SIBLE

Date of Interview: December 3, 1982

Date of Transcription: January 27, 1983

(For the purpose of clarity, (P) stands for Personnel of the Sheriff Department; (D) stands for Don Schwennesen, and (W) stands for Warren Sible).

(P) The following call came off of Tape 25 at the time of 8:22 and 11 seconds, Line 2.

(Phone ringing and answered)

(P) Flathead Sheriff's Office.

(D) Hi, Don Schwennesen calling from the Missoulian again. Is the Sheriff in this morning?

(P) No, he's not. Would you like his secretary?

(D) Yea, or is Warren Sible in?

(P) I'll check that for you, just one moment.

(D) Okay, thank you.

(W) Hello.

(D) Is this Warren Sible?

(W) Yes, it is.

(D) This is Don Schwennesen calling from the Missoulian.

(W) Yes, Don.

(D) I am sorry to bother you yesterday morning.

(W) You caught me bad—I was really sick.

(D) Yea, okay, I hope that you are feeling better.

(W) Yes I am.

(D) Well, I don't have anything that will make you feel better, but I wanted to tell you that a former detective from the Department, Max Salisbury, has raised some questions about an incident that allegedly involved you. This happened several years ago and it involved a smoke house that was allegedly taken from a former game warden.

(W) Yea, I know all about it.

(D) Okay. They feel—well Salisbury feels that he made an effort to investigate this and that the investigation was essentially covered up.

(W) Well, I will tell you what happened.

(D) Okay.

(W) Well at this time, it wasn't investigated and it wasn't covered up. What happened was, this was like 14 years ago or 13 years now, I guess—this former game warden—a friend of mine by the name of Bob Brandewie and I were out hunting and, we go to the woods down by Echo Lake and we came out on, you know, it was a piece of property. There was this old little thing sitting there, I mean, an old, an old, I guess that it was a smoke house. So there was a number up there—the property was up for sale, and that was about the only thing that was left on the property. So I told Bob, I said, "Bob, do you know who owns this?" and he says, "No, he says I know the guy that owns it". I said, "I wonder, Bob, if I could buy that from him". So I called the number that was there and it was his wife and she says, "My husband and I are divorced and I wouldn't be able to tell you one way or the other, you would have to contact him". So Bob says, "Hey Warren," (You know I told him

later what had transpired—cause he asked me about it) and Bob says (he owned the Mountain Lake Tavern at that time) "he came in there all of the time and he was quite a drinker." And Bob jumped him about it—asked him about it and he gave it to Bob Brandewie—*gave it to him.* Okay it was about a year later, Bob gave it to me because he had built himself another one. Now, consequently, they come up and say, hey, I stole the smoke house, which was, you know, its completely unfounded.

(D) Okay.

(W) And that is what the extent of that.

(D) Why do you suppose this game warden would have made the allegation?

(W) Well, see, I don't, I don't know why. In fact, I wonder why, if, he never did contact me or anybody else, you know, why wait 14 years?

(D) Um-Huh.

(W) That's kind of, kind of—really. It doesn't. You see, Bob Brandewie has consequently died of a heart attack here four or five years ago now. And, I never even questioned Bob or anything else about it. But, Bob says that he was in there drinking one night and he asked him about it and he says, "Oh, hell, he says, I've moved out, my wife and I got divorced," he says, "you can have it, Bob". Well, like I said, it was about a year later, Bob gave it to me because he had built himself another one.

(D) Um-Huh.

(W) So, but I didn't take it, I didn't. You know, like I said, I got it from a completely indifferent party as far as I am concerned. But, Max seems to feel that I took it. Why he made this allegation is, the way I've heard it, is that because I had called

his wife and asked her about it, they assumed that that I took it.

(D) Okay. Um-Huh.

(W) So, that is what I heard.

(D) Um-Huh.

(W) So I don't know why after 14 years he didn't—why all of a sudden he stepped forward now and felt that if it was some problem, he should have contacted me right away.

(D) Yea. Yea.

(W) The problem with Max Salisbury is that Max is really striking out against a lot of people in the Department—well, the election, and . . . Max, when he walked out of here, he didn't walk out of here in the best of terms. You know, he was the next best thing from being fired because of his activity with married women in the Company.

(D) Do you have any specifics on that?

(W) You know, I hate to give and take. You know what you are doing—you stir shit here and stir shit there—Well, the specifics on that were that we had a meeting in the Detective Division with Max Salisbury. He was confronted with this problem and his old partner, who worked with him for two years—two and one-half years—said, "Hey, yea, Max is carrying on personal business with married women or unmarried women while he was working". The Detective came to me when I took over the Division and said, "Hey, Warren I can't work like this. You got to do sometihng about it." I took it up with the Sheriff, the Sheriff confronted Max with it, and he denied it. But then we had a meeting with just the guys in the Detective Division and Johnny, his partner, confronted him in

front of all of us with this and he says, "Okay, if that is the way you guys feel, I'm going to go to Patrol Division". So . . . and then consequently he went to Patrol and then he left because he was—Max had quite a history of problems in here, but nothing, you know, nothing that—like I say, everything at this point is strictly heresay.

(D) Yea. Yea.

(W) It's nothing to make—you know, I don't want to—you know, Max's personal life and what is going on with his stuff is, but that's the background behind that. Max is still pretty upset about that, because he still blames me for him losing his job here.

(D) Well, you know, as a matter of fact, he volunteered some information on that to me and he felt that the incident that was raised by John Christen involved the case that he was on and Christen knew all about the background of it.

(W) No, there was a number of cases about—there wasn't cases, even, they were just . . . Well what happened and there were about five or ten or fifteen—and this was kind of an ongoing thing with Max. He had a little problem with women. And, ah, it had been going on for quite a time, but Johnny, a very good friend of Max, did not want to say anything. Then when I took over Detectives and Sudderston left, Max came—er—Johnny came to me and says, "Hey, I've got to do something about this, Warren, I can't contain him". But here had been cases, isolated cases with Max going back after work with young ladies with their husbands, where they were getting divorces, and he'd stay there all night and supposedly guard them and—a whole bunch of—it gets into real depth. And there is your background for that. But like I said, I prefer that you didn't, you know,—there is noth-

ing more to be said about that, its water under the bridge but . . . .

(D) Well, you know, if he persists in these allegations against you and the Sheriff, some of this odd stuff may have to come out.

(W) Well. . . .

(D) Do you have specifics on that to back it up?

(W) On what?

(D) On these incidents.

(W) If we had, if we had to dig into it, we could, yes, it could be done. But, as I said, I don't feel that its worth the problem, you know. I really don't. I don't think that its good for Max. He's remarried now. He's got a wife, just had a new baby. Oh, I don't think. . .

(D) I thought that he was married to the same woman.

(W) Well, what he did is, actually Max is guilty of incest—or not incest, of bigamy, because he married this other girl before he was divorced from the one he's got.

(D) Um-Huh.

(W) Yes, definitely. The divorce was not final and he went out and married this other girl.

(D) Did he subsequently divorce her, then, too?

(W) Well, he kinda did. From what I understand, he did, and then he got back together with her and I understand that they are remarried at this time.

(D) Um-Huh.

(W) And they just had a baby so, you know, Max, Max has had more than his share of problems, I feel, and think things left just left alone, you know.

(D) Um-Huh.

(W) The guy made his choice, so let him, let him do to. But Max feels that Al and myself kinda—well he didn't—Max quit—Max wasn't fired.

(D) Yeah, I understand that.

(W) You know, he could have been. But Al gave him the prerogative because the guys in Detective mentioned it along with Max. Max, we had a meeting in there one morning, and says, "Hey, I—if you guys all feel I'm doing this, I don't, you know, I don't want to work in here with you guys". So he went to Patrol and then consequently, he quit.

(D) Yea, Yea.

(W) But, this was an ongoing thing for a number of years. I think the person you might talk to is Johnny Christen, he is the one that worked with him. But, like I said, I prefer that you didn't say I told you to come to him or whatever, you now.

(D) Yea.

(W) It's, its, its all, its bull-crap what it is.

(D) Well, I'll tell ya. Max feels pretty strongly about it, as you probably realize, and he's, I believe—understand he has already signed a sworn notarized statement.

(W) Oh, yea. It went to the County Commissioner's, it went to the Clerk and Recorder's, it went to District Court, went to everything, but it was looked into and they said, 'Hey, you know, why 14 years later?' and with the consequences that surrounded it, they said, 'Say, there is no validity to it whatsoever'.

(D) Yea, well his feeling is that even though the statute of limitations is run out, at least the guy could have gotten his smoker back if it was unjustly taken from him.

(W) Yea, well shit, all he had to have done is come and ask me for it.

(D) Yea.

(W) And, he never did that.

(D) Um-Huh.

(W) You know, I never knew about the fight.

(D) Um-Huh. So . . .

(W) And, he has never contacted me, never, even after, I guess Max talked—talk to Johnny about this, Christen, because Johnny was with Max when they investigated this. And, John Christen says the only reason he did that was to trump up something on me.

(D) Um-Huh. Is that right?

(W) That's very true. I figure if you check that out that would be verified.

(D) Um-Huh.

(W) That was the reason why.

(D) What was the motive for that, anyway.

(W) Well, he don't like me. Because, see, I had struck out against him because he wasn't doing his work here at the Office. He wasn't keeping up with the rest of the case load, and then I started checking to find out why. Well then I found out all his—every case load that John, er, Max Salisbury's fact lead, we tracked it, we've got it all recorded. It's all down.

(D) Um-Huh.

(W) Every case that he worked on in the course of, oh, let's see, it would have been a year and one-half that I supervised him, ah, Max Salisbury's clear-

ance rate—everybody else's runs about oh pretty close to 50% of the cases cleared, Max Salisbury's was ten (10).

(D) Um-Huh.

(W) So, you know, Max just, he wasn't getting the job done the way he was supposed to so he felt we were stepping on him, everybody.

(D) Well, yea, he felt, specifically, that he was getting a large percentage of cases that were basically "dead-end".

(W) Well, . . .

(D) No witnesses, no leads, nothing.

(W) If you would like to stop in here, I'll show you how that system works, and I think that will enlighten you, because we do it on a rotary basis. Every day, the cases come in. Okay, I review every case every morning and of the ones that are assigned to the detectives, it's on a rotational basis, every day. Now like today, if I assign Jim Mitchell a case then . . . or let's say there are two of them —I will assign Jim Mitchell and maybe Maxine; on the next day, would be Rick Hawkes, Doc Harkins, Johnny Christen, Max Salisbury, and it goes on a rotational basis. So it doesn't make any difference, you know, he felt that, I know that, but the cases, all the other guys had the same shot as he did at the cases.

(D) Um-Huh.

(W) So. . . .

(D) They all got to work on the same cases.

(W) No, no, it was on a rotational basis. If it was your turn to get assigned to a case whether it was a

homicide, whether it was a major burglary or major robbery, he was assigned it.

(D) Yea, yea.

(W) But Max never did clear anything, but he didn't work at it.

(D) Do you have records of which particular cases went to people?

(W) Oh, yea.

(D) Do you still have those?

(W) Oh, yea, I got them.

(D) Even on Salisbury too?

(W) Ahhhh, I think the Sheriff does. I don't keep them.

(D) If you had three or four cases a day and several detectives a day, how would you. . .

(W) Well, I can . . . see, I've got my book here and I can show you how I work it. You know, some days we have maybe two, three or four cases and some days six, eight. Mondays is usually a heavy case load. And, it is strictly rotational.

(D) Yea.

(W) So, I know Max has done, really made a big stink about this and he hates Al with just a passion. He didn't feel that Al was very fair to him and all. But I think if you check with the guys in the Department, you will find out where Max is coming from. He's got a little problem. I feel sorry for the boy, I really do. And, there was a letter wrote to, ah, wrote to Max Salisbury in reference to this, . . in fact, he even went to the Union with it because he was mad about it . . . stating that we had had a meeting, and that it was for him to be known that his case load was not holding up to what the

other detectives were and that this was only to enlighten him to the fact we were taking a look at it and that for him to do accordingly what he felt had to be done. He even fought against that. He just wouldn't do it. I think the best thing for you to do is check with the other detectives.

(D) Um-Huh.

(W) And, get their feelings, if they'll talk to you.

(D) Who, most particular, would you recommend that I talk to?

(W) I think Johnny Christen.

(D) Okay.

(W) He worked with him for two (2) years. But, John may not tell you anything.

(D) Um-Huh.

(W) I think that Johnny will probably . . could tell you more than anybody because he worked one-on-one with him every day. But it was his whole point—and, Max was really upset about that—when John came forward and squealed on him.

(D) Yea, he was.

(W) But John said, 'Hey, I'm not covering up for him any longer'.

(D) Um-Huh.

(W) So . . . do you see the wheels? How they are turning?

(D) Yea. You know, what you say sounds very reasonable and plausible, and what he says sounds very reasonable and plausible, so . . .

(W) Well, we've got—yea, that's the way it's been around here.

(D) Yea.

(W) That's the way things have really been and Al, in trying to be fair, you know, didn't want to fire Max, well number one (#1) he had no grounds to, for firing Max, you know.

(D) Well, if the guy wasn't keeping up his case load.

(W) Well, no, that doesn't, no, nope, nope, that's not grounds. See there is only specific things that you can be fired from this job for.

(D) Um-Huh.

(W) They are still sleeping on duty, direct negligence of your duties—you know, you've got courts and all kinds of stuff—you've got to show cause. So, Al didn't want to do that to Max. See, Al' been a, as far as I am concerned—I worked—this is my third Sheriff, fourth Sheriff and of all the sheriffs that have been in here, he was the best administrator going, and he felt that, well because Max wasn't doing a good job in Detectives, maybe a change of scenery, you know, back into Patrol might do him some good. So, that was his, his, his conception on that. Well, Al's biggest enemy was himself because basically, he is pretty easy, trying to be fair.

(D) Um-Huh.

(W) So, he probably could have been, in a lot of cases, been a lot tougher on a lot of people, but . . .

(D) Yea.

(W) But, Al tried to keep it on an even keel says, "hey, you do your job, what you're supposed to do, and I'm not going to give you any trouble. You just get out there and do what the taxpayers are paying the money for".

(D) Yea.

(W) That, basically, has been pretty much the ballgame.

(D) Yea. Well, to continue, Max feels very strongly about this. He's, as I said, put a statement out with a thing—put his name out there and he feels very strong that the newspaper should write a story about this, you know, detailing this cover-up, alleged cover-up, and so I would like to know what I can say of what you've told that I can say, you know, to give valid to this thing.

(W) I think that, I think that that is kind of up to you guys. Because I feel, I feel this way, that's what transpired and you can check with the Sheriff, you can check with Johnny Christen, and myself, I feel if it comes out in the paper, due to nonvalidity meant, that that's libel on my part—that is putting me in a libel position, and I will surely pursue legal counsel on that.

(D) Okay.

(W) With both, with Max and the paper, if necessary.

(D) Okay. Um-Huh.

(W) That's my, you know, my stand of it.

(D) Okay.

(W) So, I feel that, you know, I have no control over the things of what Max Salisbury feels and is very put out about the way that he was treated here. You know, if that was the case, anybody—there is a lot of stuff that could be said that isn't, and if it all came to light, poor Max would end up on the bad of the stick and I don't think he wants that all put in the paper.

(D) Um-Huh.

(W) I, number 1 (#1) wouldn't even contemplate doing that to him.

(D) Um-Huh.

(W) So, what it does is it takes away from a lot of a person's character. Max has been here really a long time, he's got a lot of friends, and I'm sure that it would have some impact on his future jobs.

(D) Um-Huh.

(W) So, I don't think that is the way to handle things.

(D) Yea. Okay. I think that I will probably talk to Max again and discuss our conversation.

(W) Yea.

(D) And advise him of what you have told me and see if he wants to pursue this.

(W) Oh, well, you know. . . but, I think before you put anything in the paper, you better be talking to the Sheriff and the Commisisoners, and the Clerk and the Court because it was all recorded and everything.

(D) Right, yea. Which of the Commissioners would you suggest that I talk to?

(W) I don't know. A copy of it went over there.

(D) Yea. Yea

(W) But, ah, I, as I said, you know, it was 14 years later and it was—I think if you get a hold of Johnny Christen, he will explain it to you why Max did that, he was pissed at me and that is the reason for striking out. So, and John's a pretty straight shooter.

(D) Um-Huh.

(W) Very.

(D) Alright.

(W) Okay.

(D) Tell me, is the Sheriff in at this point?

(W) No he's not. . .

(D) Okay.

(W) That I know of.

(D) I want to talk to him about this too, but. . .

(W) Okay.

(D) I'll call back a little bit later.

(W) Okay. (D) Thank you very much, Warren.

(W) You bet, bye-bye.

(D) Bye-bye.

(At this point, the phone is hung up at both ends).

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

This brief is necessary to counter three arguments raised in the respondent Sible's brief in opposition: (1) his factual argument concerning the record; (2) his argument that the Montana Supreme Court's decision *is* consistent with *St. Amant v. Thompson*, 390 U.S. 727 (1968); and (3) his argument that the Petition is premature because the reporter's notes have not yet been examined.

STATEMENT OF THE CASE

Sible's factual arguments depend almost exclusively on two mischaracterizations: (1) that the reporter Schwennesen "purposefully" decided not to contact John Christian, even though he was "warned" and "implored" to do so by both his source and Sible; and (2) that both Schwennesen and his editor essentially admitted publication with actual malice. Neither argument can survive examination of the record.

Sible ignores the fact the Schwennesen twice tried to contact Christian and found that he was on vacation. Tr. at 1850-51. Later, Schwennesen determined that it was unnecessary to contact Christian after Sible affirmed he had the smoker in his possession and after the sheriff and Eckerson had confirmed other elements of Salisbury's story. Tr. at 672-73, 1872, 1873.

Sible also exaggerates how much he stressed that Schwennesen should contact Christian at the time Schwennesen was conducting his investigation. When at one point Schwennesen asked Sible who he would recommend Schwennesen talk to, Sible said: "I think Johnny Christian . . . . But, John may not tell you anything." Tr. at 596. Even at trial Sible admitted he did not know what information Christian would have provided. Tr. at 1407, 1408. Sible also recommended that Schwennesen contact the sheriff, Tr. at 598, 600, which Schwennesen did do several times. In fact, the record reveals that Schwennesen had multiple corroborating bases for his article.

SUMMARY OF ARGUMENT

Sible's brief is founded on three primary errors. First, Sible attempts to capitalize on the Montana Supreme Court's error in viewing the facts in the light most favorable to Sible.[1] A balanced review of the trial record,

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[1] Sible cites *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), for the proposition that the

however, reveals no actual malice. That was the determination of a properly instructed jury. That also was the determination of the one Montana Supreme Court Justice who refused to view the record from an intentionally one-sided perspective. *See* Concurrence of Justice Hunt in Appendix to Petition at 9a-11a. Sible's brief compounds the Montana Supreme Court majority's admittedly distorted presentation of the facts by further misconstruing testimony and taking statements out of context.

Second, Sible attempts to reconcile the Montana Supreme Court's opinion with this Court's definition of actual malice in *St. Amant v. Thompson.* It is impossible, however, to evade the fact that the Montana Supreme Court rejected jury instructions taken nearly verbatim from *St. Amant* while not even acknowledging the existence of the case.

Third, Sible makes the unsupported and erroneous assertion that because Schwennesen's notes were not part of the original trial record, the Court would be pre-

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Montana Supreme Court correctly viewed all the evidence in a light most favorable to Sible rather than making a balanced independent review of the record on the issue of actual malice. Respondent's Brief at 9-10. There are two flaws in Sible's argument. First, the standard articulated in *Liberty Lobby* was in the context of summary judgment, not review of a jury verdict. This Court has clearly distinguished those contexts. *Liberty Lobby* stated: "At the summary judgment stage, the judge's function is not himself to weigh the evidence but to determine whether there is a genuine issue for trial." 91 L. Ed. 2d at 212. In contrast, the Court stated in *Bose Corp. v. Consumers Union of United States, Inc.*, that a court reviewing a jury verdict on the issue of actual malice is to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. 485, 514 (1984). The second flaw in Sible's argument is that if the Montana Supreme Court had applied the standard Sible advocates, it should have viewed the facts in the light most favorable to Lee Enterprises and Schwennesen, not Sible, since Sible was the losing party at trial and the moving party on appeal to the Montana Supreme Court.

mature in granting either summary reversal or certiorari. Schwennesen's notes have been made available in response to a request for production, and the Court may properly review them in making its determination of the finality of the Montana Supreme Court's decision. A transcript of those handwritten notes is being filed with this brief as an Appendix.[2] The Court can see for itself that there is nothing in the notes that could justify the burden and expense of yet another trial, and nothing that poses an obstacle to summary reversal. In any event, the Court repeatedly has found state court decisions ripe for review where they threaten First Amendment rights despite ongoing lower court proceedings. Even if summary reversal is not granted, well-established precedent justifies granting certiorari without awaiting further proceedings in the state courts.

ARGUMENT

I. SUMMARY REVERSAL IS APPROPRIATE IN THIS CASE.

Contrary to Sible's contention[3] and the Montana Supreme Court's decision, the jury was properly instructed on the issue of actual malice. Both Jury Instructions 12

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[2] On March 30, 1987, Sible propounded interrogatories, requesting information regarding Schwennesen's notes. Schwennesen agreed on May 1, 1987 to produce those notes in response to an appropriate request for production and protective order. Because Schwennesen kept notes chronologically and not separately for each story, the Appendix omits interspersed notes concerning other stories. The Appendix has been bound separately to insure that only the Court and the parties have access to the notes to protect possible privacy concerns of individuals named therein.

[3] Sible claims at page 12 of his brief that the jury instructions did not set forth "the definition of actual malice, which is simply publishing a known falsehood or recklessly disregarding the truth." This charge is patently false. Jury Instruction 11 stated that the plaintiff must prove that the article "was published with malice, that is, with knowledge that it was false, or with a reckless disregard of the truth." Appendix to Petition at 5a.

and 13 were taken virtually verbatim from *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See* Appendix to Petition at 5a-6a. Nevertheless, the Montana Supreme Court characterized those instructions as "fatally defective" without even mentioning *St. Amant*. *See id.* at 6a.

Amazingly, Sible claims those instructions confused the jury on the correct legal standard and were actually contrary to *St. Amant*. *See* Respondent's Brief at 14. The jury was fully instructed by Jury Instruction 13 that they need not believe the reporter's subjective statements but could find actual malice if the story was published "despite obvious reasons to doubt the veracity of the informant upon whom the article was based, or to doubt the accuracy of his reports." Appendix to Petition at 6a. Based on the evidence at trial, the jury determined there were no obvious reasons for Schwennesen to doubt the veracity of Salisbury's story.

It cannot be overstressed that the Montana Supreme Court conceded that, under the instructions given, the jury could have found "there was no actual malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement." Appendix to Petition at 7a. It is even more significant that the Montana Supreme Court came to that conclusion after viewing the evidence in a light most favorable to Sible. *Id.* at 2a.

A fortiori, had the Montana Supreme Court made a truly independent review as required by *Bose*[4] rather than its one-sided review in favor of Sible, and had it applied the proper legal standard under *St. Amant*, it would have upheld the jury's finding of no actual malice.

Sible argues that *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1977), *cert. denied*, 449 U.S. 1102 (1981), bolsters his contention that the jury instructions were erroneous in this case. *See* Respond-

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[4] *See supra* note 1.

ent's Brief at 14. To the contrary, the *Alioto* court quoted *St. Amant* for the very same actual malice standard rejected by the Montana Supreme Court. 519 F.2d at 779 ("The defendant must be proved to have subjectively 'entertained serious doubts about the truth of his publication.' ").

Sible also argues that the Colorado Supreme Court in *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315 (Colo. 1981), found actual malice on facts "akin to the facts of Sible's case." Respondent's Brief at n.6. This case and the Colorado case are, in fact, quite disparate. Specifically, the Colorado Court found actual malice only where (1) the reporter "admitted that he had *no basis* for most of his erroneous statements;" *and* (2) "he failed to take time to corroborate allegations made in the articles;" *and* (3) he failed "to pursue the most obvious sources of possible corroboration or refutation." *Kuhn*, 637 P.2d at 319 (emphasis added).[5] In addition, the *Kuhn* court was *upholding* a jury finding of actual malice.

By contrast, Schwennesen had multiple corroborating bases for his statements, including Sible's own admission that he had the allegedly stolen property in his possession, and Schwennesen did pursue multiple sources to verify the allegations made by Salisbury. After considering all the evidence, the jury in this case found no actual malice.

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[5] A later Colorado case distinguished *Kuhn* and found no actual malice where the evidence did not show that the reporter actually fabricated facts. *Manuel v. Fort Collins Newspapers, Inc.*, 661 P.2d 289, 291 (Colo. App. 1982). A subsequent Colorado Supreme Court case followed *Kuhn* in finding actual malice, but again only where the Court was *upholding* a jury finding and the reporter "testified that she had *no basis* for the use of the defamatory language . . . ." *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1362 (Colo. 1983) (emphasis added). It should be noted as well that the Colorado Supreme Court later cited *Kuhn* in approving a jury instruction almost identical to Jury Instruction 12 rejected by the Montana

The fact that Schwennesen's notes were not part of the original record should not prevent this Court from summarily reversing the Montana Supreme Court. Those notes have been produced in response to a discovery request and are available for the Court to review.[6] The Court will see for itself that nothing in those notes shows that Schwennesen entertained serious doubts as to the truth of the article. Since *Bose* requires a reviewing court to make an independent review of the evidence on actual malice, the Court can summarily reverse the Montana Supreme Court and avoid unnecessary relitigation of the case. Schwennesen's notes reveal that they do not warrant the burden and expense of a new trial.

II. IF SUMMARY REVERSAL IS NOT GRANTED, A WRIT OF CERTIORARI IS ESSENTIAL AND SHOULD BE GRANTED AT THIS TIME.

In order to review a decision of a state court, this Court must first determine that the decision is final. 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, the Court recognized four categories of cases that it will treat as final without awaiting completion of additional proceedings in state courts. 420 U.S. 469 (1975). In

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Supreme Court. *See Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1109 (Colo. 1982) (also citing *St. Amant*).

[6] As discussed in the following section of the brief, the Court must decide whether the Montana Supreme Court decision is final for purposes of review. In making that determination, the Court may examine "both the judgment and the opinion as well as other circumstances which may be pertinent . . . ." *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947). It is well settled that "other circumstances" include relevant matters both within and outside the original record. *E.g., Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946). Therefore, the Schwennesen notes, which were not part of the original trial record but which now have been produced, are reviewable by the Court.

describing the fourth category, the Court stated it would review cases

> where the federal issue has been fully decided in the state courts with further proceedings pending in which the party seeking the review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . . In these circumstances, if a refusal immediately to review the state decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state court for purposes of state litigation.

Id. at 482-83.

The Court has identified the First Amendment as one of the key federal policies it seeks to protect by asserting "category four" review. In *Cox Broadcasting*, the Court held that a Georgia Supreme Court decision was final despite ongoing lower court proceedings where the Georgia Supreme Court decision would have left the local press in an "uneasy and unsettled constitutional posture" harmful to the operation of a free press if the Court delayed its review. 420 U.S. at 485-86.

A similar unsettled constitutional posture will result if the Court delays review of the Montana Supreme Court's decision. That decision stands as a summary reversal of *St. Amant*, leaving the Montana courts, including the court on remand, with a Hobson's choice of whether to disregard the prior mandate of this Court or to disregard the clear order of the Montana Supreme Court. It also presents the Montana press with the same untenable dilemma and significantly restricts the operation of a free press.

In *Miami Herald Publishing Co. v. Tornillo*, the Court held that a Florida Supreme Court decision remanding a case for further proceedings under a state "right of reply" statute was final for purposes of review. 418 U.S. 241 (1974). The statute required the press to give equal space to any political candidates it criticized. The Court stated:

> Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the Florida statute] could only further harm the operation of a free press.

Id. at 246-47 & n.6.[7]

It is equally harmful to the operation of a free press in the State of Montana to leave unanswered the important First Amendment question raised by the Montana Supreme Court's rejection of the *St. Amant* standard of actual malice in this case.

CONCLUSION

This case is ripe for the Court's review. Clear precedent establishes that the Montana Supreme Court decision is final for purposes of review.

Nothing prevents the Court from summarily reversing the Montana Supreme Court. Even that court acknowledges that under the legal standard of actual malice articulated by this Court, the jury was justified in finding no actual malice. The reporter's notes have been

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[7] *See also NAACP v. Claiborne*, 458 U.S. 886, 907 n.2 (1982) (free speech); *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (free speech); *Nebraska Press Ass'n v. Stewart*, 423 U.S. 1327, 1328 (1975) (Blackmun, J., sitting as Circuit Justice) (free press).

made available in response to a discovery request and are properly reviewable by the Court. In making its independent review of the evidence, including those notes, the Court can determine for itself that there is no clear and convincing proof of actual malice. By summarily reversing the Montana Supreme Court, the Court will prevent unnecessary relitigation of this case under an erroneous legal standard imposed by the Montana Supreme Court.

Even if the Court does not grant summary reversal, the Montana Supreme Court's decision is final for purposes of granting certiorari. The Court has readily granted certiorari in similar cases in which a state court decision seriously infringed First Amendment rights.

Petitioners respectfully urge this Court to act immediately to relieve the Montana press and lower courts of the dilemma created by the Montana Supreme Court's summary reversal of the *St. Amant* rule.

Respectfully submitted,

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APPENDIX TO PETITIONERS' REPLY BRIEF

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TRANSCRIBED NOTES OF DONALD SCHWENNESEN RELATING TO SIBLE STORY

This is Don Schwennesen, Missoulian Reporter, reading from my reporter's notes pertaining to the *Sible v. Lee* lawsuit.

I am dictating this on April 23, 1987. I am reading from books prepared in 1982.

The first is my Notebook No. 49, dated October 8 through November 2, 1982. All notes are chronologically in order, however, not every entry is dated.

Notebook No. 49 Dated October 8, 1982 Through November 2, 1982

ENTRY

If certified for hearing—six months to one year—
Ray Brown—
Ann McIntyre—not filed with us.
A provision in rules adopted for confidentiality
Neither charge nor information obtained—nor records—shall be—
recent Supreme Court decision constraining authority to investigate
matters that might conceivably

Union Agreement—breach—unfair labor practice
Board of Personnel Appeals—call awhile ago regarding commissioner
campaign practices

Board Personnel Appeals—

Lympus; four have approached me with problem—referred to
AG—today—allegations to effect that they intimidated by sheriff because not supporting them—

I can't investigate—no capacity plus too close—requesting
investigation—because not supporters—
He's not one of them—

961-3457; Greg

* * * [1]

ENTRY

Montana Highway Patrol Sgt. Dan Kraut—Missoula—
Story in Kalispell
Suspect Rierson like alot of sheriffs dismiss charges
also sexual harassment—

* * *

ENTRY

Britt Davis—Great Falls
$95,000.00 buy money—detective sought—all gone—
Norm Hayden—

Tape Dennis Updegraf
Ernie Freebury
7—4 Statements done, 3 still being prepared
20-30 eventually

55 in department

Sybo—$1,000.00 burglary—Daughter

Schwinden took Al off crime board
Ron Clark

Sting operation—a political ploy—throw
big party—bust two days before election

ENTRY

Lympus; I've got to be really careful that because office
isn't used for that purpose. I'm not going to
allow my office to be used by either

---

[1] Note, * * * indicates intervening notes unrelated to the Sible matter were omitted.

Fritz Baer—Criminal Investigation Bureau
would deliver results along with recommendations
two others including one former department employee
one local journalist—

Crone called end last week—asked what tell these guys

they negotiating—no complaints last few months.
Lympus said told them can't be resolved before election—
they said they understood—

April 1—9:15 (2 months ago)
Updegraf, Barenger, Freebury, Fister, 90 minutes
March 18
Norm Hayden—Security business—257-2102
Speelman—

without trying to pass judgment, do feel worthy and merits
investigation

Dennis Conner—son-in-law and attorney—got allegations

ENTRY

JoAnn—Advised not to til investigation complete At
this point I have not talked to the AG's office—
(first time she knew they would act was earlier this
week—has had others who in end refused to sign—
several
who often said when do something on Rierson she
said would protect sources but you guys have to talk—
they scared—I can understand—it's tough when you
want to say something about any employer—in last year
more—first she knew they serious was this
week—
there have been several—about time search for plane
Al
was livid, absolutely irrational—in my heart I don't
know

what he was
upset about for sure—same day he in Inter-Lake reamed
out Pat King—King said he couldn't believe a public
offi-
cial would act
that way—wanted to meet with her boss—said would
have her job—he believed she thought concocting whole
plane thing as a political thing—I don't understand why
he thought what he thought—
want the public to know their side before public goes
to vote
—she just made statement—not complaint
I've been around Al 13 years—I think he's partly
paranoid—I've thought that for years—he's not
good at handling criticism—if someone said something
good about Chuck he would think it was bad about
him—a true sign of paranoia
later he saw no reason for meeting
used to call Greely two-three times a week demand high-
way
patrolman
be transferred out
I don't like the timing but
it wasn't anything I could do anything about

ENTRY

Oberndorfer; Dick Cantrell—Jailer
Hayden will not talk—one complaint was JoAnn ordered
by Al
to investigate Hayden and deputies out joyriding in cars
—Al
said would furnish facts—JoAnn went to Hayden who
that night making rounds, went to see carlot, noticed
whole
line of cars in back had keys in doors—waited til
deputy arrived, they left—subsequently alleged Norm
joy
riding

in used cars—Norm sought libel suit—then Al brought in Norm, threatened him—also charged Hayden
more
there are people down there who are not going to vote for the
sheriff—whoever
Al not aware

755-7199 Rick Fister

Rick is suppose to hear from AG tomorrow—will
Al has surveillance on officers
Rick will have to stay within realm of statement county attorney—
legal counsel said lay off—
suspects manipulation within the files—

Dennis Updegraf—he works until 10—
Fister

ENTRY

Hayden a statement of facts—basically its evidence—
—a direct threat against me—
save any comments til after AG
my concern is trying this thing in the
papers—threat was made against my business and livelihood—if backed another candidate.
on campaign committee—Rhodes had no idea this was happening we purposely kept him in the dark—I had even considered resigning from his campaign committee you guys scooped this before I could resign—we're talking about solid concrete
charges that have been in works for sometime
former K-9 officer—left in '78 not
quite 4 years ago—not during problems just couldn't work under the conditions—couldn't face another 4 years of it—August 10 last day—
—worse—should be saved for the investigation—

[The following lines "I know . . . off the ground" are lined out but legible]

I know how it looks coming out this close
to the election—its taken that long to
get off the ground—

Rick Fister—to my knowledge Rick Crone not seen
statement either—

Freebury gone hunting

Cal Beringer—755-8553

* * *

ENTRY

Democratic party protects Democratic incumbent—
call Dennis—Rick—after 7:30
Stephens: Somehow want you to hear a tape—then
you'll know—

* * *

ENTRY

Lonn Holklin—443-0090

Commissioner of Political Practice 449-2942
Jack Lowe—Staff Attorney—

I don't know at this point—have
theoretical power—don't know if time and money—
no I would not—it looks to me
like—would have thought it would suggest of
a felony
[off record claim murders, rapes, robberies
I think something's going to have to be done—AG
law enforcement would have help
argued with Fritz Baer
statute of limitations is 2 years or 4 years—isn't
any hurry to jump up there and do it this week

* * *

Notebook No. 50 Dated November 2, 1982 Through November 23, 1982

ENTRY

Lympus; not doing anything til after the election—
he called me day after returned—told me same
as told you—
—misdemeanor election laws—
—intimidation—a felony or not intimidation
have to have specific purpose do some specific things
Wertz case—stopped secretary—said if you don't
let me have intercourse, I'm going to rape you
or if prosecute friend DWI, I threatened to kidnap your
kid

* * *

ENTRY

Rhodes; good—feeling was information receiving
would probably win but by narrow margin—
feeling pulse I had out here was time
for change—slogan "Peace Officer" not politician
talked some about budget—
stability—there was a paper blizzard
we're wrapped up around the spoke a little—
make more efficient—[the following two words are lined out but still legible] get your
when
reports come in at least 7 different places have to
file it—talked to some of girls, we can
eliminate some.
some equipment can be utilized that will help—
(TV—video tape machine in office never used)
delegation of authority entails—responsibility is sheriff's
no matter what happens—ought to be run like a business
worked 57-63 Chevy garage—parts man 13 years—
when working at garage service man didn't worry about
spark plugs—if customer complains then manager

gets involved—don't worry about nuts and bolts—
you got give that man authority—
in some cases let them do it—
should have spokesman—I think men
trained well enough—shift sergeant—to know what can/
can't release—
will establish chief criminal deputy back—(Dutch
Taylor)
primary mission is to protect life and property when
complaints, very important to follow-up. Cec Cowkes—
will consider 4-10 shift—can maybe
save money—will require agreement with association—
was negotiated last year
(AFL-CIO Western Montana Law Enforcement Associa-
tion—
Doc Harkins
as far as I was concerned that was a
separate incident—not part of a campaign—was
aware some of them had been talked to—
was told after they filed—
I don't think so—probably lost a few and
gained a few—
4 January 1st Monday in January

* * *

ENTRY

Updegraf;
—smoker
—saddle
—phone bills
—coin shop
—ring
—Richard Stewart rifle
—Stewart van crimestoppers
—trip to Deer Lodge to seek testimony
against another officer

—car sold to Wrecker firm
—tearing up booking sheets
—National Guard General—

* * *

Notebook No. 51 Dated November 23, 1982 Through December 13, 1982.

ENTRY

Stephens—Pony Express
755-9765 844-3473 Updegraf
individual who came to talk
to us working on briefs—royal
run around—get impression
they wish I would just shrivel up—he asked now
Al no longer in office where you stand—he said
criminal not political charges—the only political thing
was because Rierson chose to make it that way—
I didn't choose to be called in and put through
what I was put through—he intimidated me,
that's why I filed intimidation charges—Bob set
meeting with Governor—followed his procedures—in
first place wouldn't file charges if didn't feel
had cause to charge them—
home all day today—in town 3:30 p.m.—
tonight 6 p.m.
Jack Lowe—Mrs. Krevick
work Friday 10-6 Monday p.m.—up to 1:30-2 p.m.
into Lakeside—Short Branch-turn across street
from Short Branch—past fire hall to top of
hill turn left cul-de-sac—his house on
lower side—223 Sunrise Lane—

Norm Sundholm—Pony Express
Kingsman—Louis Louis
he and brother later started Sun Music

A.G. has list
packet of statements to Governor

1. Call Lowe—status report—
2. Updegraf
3. Lowe—report back
4. Greely
5. Schwinden
6. List people plus any others who fence runner
7. Stephens—

* * *

ENTRY

11/24 Commissioner on Political Practices
Krivek—we sort of
got it dumped in our laps—
our attorneys been up there
investigating it
it's even debatable
whether it's our case yet
another thing that's delaying
us—sheriff is still in
office—we would need
law enforcement officers up here—it was very difficult to investigate
with the sheriff in office—really hasn't been any
decisions
made yet
will be if there is a case after the new year--
we've heard reports about this
I think if he left the country it would
complicate our investigation
I'm not quite sure that this has anything
to do with our office—A.G. gave.
If filed under criminal code, it'll probably be a felony
we have nothing definite to give you yet.
There were others—but he hasn't made
any big decisions yet—
Either we will file or A.G.'s office will file them or

may be the county attorney up there—but first
we have to find out if the charges were committed—
we can file a felony—in District Court in Kalispell
it's not going to just die a natural death unless
we give you a statement that it is—it's
not going to fade away.

* * *

ENTRY

October 14—filed charges. Updegraff 11/29
[promotions made—offered—strictly to
those in his camp
Lieutenant Sible to captain. Captain LaBonty to chief deputy
Patrolman McGill to Sergeant, Stolfuss, Jailer to Sergeant
Jim Haupt, patrolman to Sergeant.
Others who turned it down Lieutenant Trahey offered captaincy
Lamb Sergeant, Mitchell Sergeant
17 chiefs and 13 indians
($6,000.00 rumored missing from sheriff
detective Lamb getting Sergeant's pay
Corporal Haupt getting Sergeant's pay
Stankey receiving Sergeant's pay (only one longer than him)
Stollfuss receiving Sergeant's pay
his date rank as corporal 4/12/77—Brendeman and Wilson
got corporal he first
list of 29 names—in, former and outside
department
felony crimes covered alleged—juggling of books—
extortion—destruction of records (jail records)
tired of being a second class citizen
was once ready to break down door for intimidation charge

against another officer. I'm angry and upset—I'm trying
the system and it seems like the system's going to
go potty on me, I don't like it
45-5-105
inflict injury—confine
can't
expose any person to hatred, contempt or ridicule or
take action as political official against anyone or anything,
withhold political [the previous word "political" is lined out and the word "official" is written over it]
action or cause such action or
withholding
maximum 10 years
can be felony or misdemeanor

13-35-218
Coercion or undue influence of voters—
use or threaten to use force, coercion or undue influence
no penalty
13-35-226—no public employee may coerce to vote
$1,000.00 county jail—6 months

day after charges filed Ed Marriott Bigfork confirmed as
full-time after probation period previously expended—

has denied intimidation in press—
I didn't do this to get Chuck Rhodes in to office I did this
because I had
the timing stank as far as we were concerned but
we did it as soon as we could
labeled mudslinger and liar
I want this to go to court—I want them to put
Al Rierson on the stand I want to go to the court—
I want it to be heard
If drags on long enough, will play for publicity

Fister complained—Updegraf his supervisor—so
investigated—

we're police officers—we know what we have to
have to file charges

one statement has felony coverup theft

Max Salisbury—felony theft coverup
Jim Fitzgerald—embezzlement case
Amber Meyers—intimidation, [word illegible]—
treasurer/motor vehicles
Gary Franklin—witness to Freebury—was out of
town
Fister—Berringer—Freebury
Was going to get plowed and go try to find something
cuddly
now that Al's out do you want to go through with this—
has transcript of tape—

moving political practices office—
Salisbury statement held up—
(Hayden, Potter, Updegraff, got Rector when he sur-
rendered)

ENTRY

449-2942 11/30
Status?
laws under consideration?
Rierson to Mexico?
List of 29 names?
Package to Governor's office?
Possible information regarding felony theft coverup?
Commissioner Krivek
or Jack Lowe—
father ill—to Arizona
Blake Running, auditor
gone for 10 days—
gone 1 week—
Krivek
A.G. has all papers while
he's gone—it isn't back

to them officially—they
consulting—he will be out of
town for a week—does not
make any difference—we have
found once the case is
filed it doesn't matter where
he goes—doesn't mean it
goes to the judge right
away—even with a speeding
ticket they give you time to
make it convenient for you—
it would still be open up
to seven
I haven't gotten anything
other than what I originally
sent—the 6
no final judgment

* * *

ENTRY

12/1
Salisbury: 6 went in—he didn't go in
that day—personally contacted Ted later asked
if he wanted statement—said he would look at
it—more we talked more he realized didn't
want it occurred in courthouse parking lot—within 2 or 3
days after initial complaints—first time acted like didn't
want it—Lympus leaving in pickup—said bring it in
I'll look at it, don't know if it'll help—
These are facts bearing on case—
met approximately 1 week later—Ted said didn't feel
statement would be of value—I of course asked him
why—
he said he felt it may do more harm at that
time—felt there was enough ammo—if throw
too much out may provoke sympathy—I decided
with that why bring it in—he was aware of
statement—I wasn't that concerned due to the

fact that a copy of my statement had been sent
to the Governor
resigned August 15, '81—reason I resigned was if
Sheriff Al Rierson wanted to employ and also have this
individual as supervisor and yet I filed report that he
was involved in a theft not only did I suspect him
I had an still have a witness that will testify that
the victim observed his stolen item in Sible's yard—
he walked right in his yard and observed it—
he had been detective—was being transferred July 1
from
detective to patrol—reason I was given was sheriff
decided it was time for all detectives to rotate
back through patrol on a 6 months basis—
detective was paid then same as senior patrolman—
wanted to start with detective who'd been there longest
but started with me—(Harkins had been detective
longer)
He was only one—
why—it was very obvious—can't prove but from
time Sible moved from Lieutenant Traffic Division to
Lieutenant of Detectives
I believe it was about May—at time he was moved
into detectives I was investigating him—
(Saddle: Jim Magill and Dan Yourman, Sargeant of
Detectives
investigated saddle—Magill since promoted after elec-
tion—
with John Christian saw Ted in parking lot asked about
saddle—he advised
had done everything he could—turned back to sheriff—
Sible said lady California had saddle—
one of my biggest questions Don is what kind of pull
does Rierson have in Helena—seems like everyone's
afraid
of him they don't want to investigate him—is he
on the payroll does he have something on him

When quit '81 took copy of the Sible investigation to County Attorney—County Commissioner's Office, Ted's secretary, Joan

Deist—original suppose to have reached Rierson because gave it to undersheriff—he had been advised by Rierson that I was coming in turning in all my equipment—Sible and I will be here to check it in—but weren't around when I came in—had advised Gary Franklin—gave original of report plus copy for Sible—I wanted everyone to know exactly what I found out—also copy in Clerk and Recorder's Office—

(Saddle: California lady said would take polygraph if Sible would too)

Homemade smoker for fish—meat—materials $100.00—$200.00: Bill Eckerson ex-game warden

Eckerson had married 5-6 times separated emotional problems threatened suicide—Sible, Yourman, Salisbury possibly one other—brought in on protective custody—he booked, made calls, released same night he booked—

working security at Outlaw:

Walters El Rancho case—off duty—Sible and Franklin investigated—

when he returned home realize smoke house gone—started doing some calling contacted an ex-wife, picked up information that Sible had contacted her asked what Bill was going to do with smoke house (was built to be permanent instead of portable)

bought fancy [next word illegible] lights could have bought
three older for one new
phone bill—county credit card when Don Rekston working
Sible caught using credit card for personal use—$120.00 or
so—
father ill in Chicago—he said daughter had abused—
100,000 Bigfork house—wife works hospital—daughter married/divorced
to son of friend—baby grand/organ—had to [word illegible]
Maxine credit card—to California—personal calls—after memo out to log—probably pre-November election

He found out Sible had been asking about smoke house—
drives to Bigfork stops at Echo Lake store approximately
got directions to Sible residence—drove in—did not approach
door—saw vehicle in yard waited for someone to come
out no one did—looked around spotted smoke house similar
to his in northwest yard—walked over—even before
got there knew it was his—went back to house,
waited for someone to come out, no one did so
he left—if he'd seen something of his in your yard
he wouldn't knock at your door—as far as I know
it's still sitting in his yard—7 years ago—Sible
can't be arrested but could still return smoke house
no reason to have smoke house other than that
he wanted—
most built old refrigerator—Bill's wasn't like that
probably 3 feet square or larger approximately 6 feet high—
on concrete blocks—
would hang meat, in bottom 8 inch stove pipe elbow—would

build fire outside to
when Christian and I investigated—took photos though repainted Bill identified it—was Forest Service green underneath
we took pictures so no doubt same smoke house—
investigation started under Sodorstrom—
Spring '81 Bill contacted at El Rancho 1 night—where he
workin
overtime on burglary—he asked if Sible still working for us I
said sure—he said smoke house stolen
Sodorstrom said investigate like any other case—burglary—
sheriff did call Sodorstrom—Rierson called John and I in said investigate like any
other case then give me report—we asked no inform
Sible (but probably already had)—after got pictures
trying to locate Bill's ex-wife—I never had problem
with confrontation Sible—Christian went round and round
with Rierson over
Sible in charge of detectives—for first 3 weeks May no problem—then 3rd week May Mitchell and he went on wagon
train trip through Dixon, etc.—didn't expect Christian to be
there when return—when came back realized I had
problem—John and Sible buddy buddies—Salisbury asked
what going on—Christian said you've got to know how to work
these guys—week later got letter from Sible on
not working not following up—complaint from fellow detec-
tive
regarding demeanor in handling female complainants—

(he married now, at time he separated but January '81
reconciled, still problems)—so went to Sible asked
how about reports
(meanwhile had noticed was getting shit cases—
no suspects no leads whatsoever—when nothing to add
what do you do?—2 days before wagon train trip
confidential
informant contacted Tuesday A.M., Tuesday P.M. did
drug
bust case completed Thursday—but got letter
after returned said not working)
morning of letter had left house about 6 A.M. had
another confidential informant—female—had notified
office left
phone number and confidential code (she had private
business at home)—
Sible called her to find out what I doing, said
supposed to be at work—finished interview, returned and
found
letter on desk—Rierson thought I pretty explosive, when
he first took office I shot dog in mid air leaping
for me—almost threw 50 year old man off river in to
bridge [should be off bridge in river]
Cal Mont Lumber Whitefish Stage Road—he living on
Whitefish Stage going to school Flathead Valley Com-
munity
College at time—when started bridge
they went to Reserve put signs said Bridge Closed—
he lived south of sign didn't know bridge closed—
off duty would patrol Cal Mont cross bridge—
when I approached bridge saw pickup coming fast so
dropped off single planks Cal Mont he pulls in
front and stops me—I got out he puts foot on
bumper tells me get off bridge—
a week later in front office Rierson asked about Marvin
Grob
—Rierson

said your temper's going to get you in trouble—getting physical
with prisoners less than 1 per year in 9 years as far as actively
resisting—martial arts for years—you know how to do it,
not afraid to do it, in shape to do it—from those
2 incidents Rierson had idea I was rowdy type individual liked to thump on people
only 1 complaint from prisoner—was Brock Wilson—
put in detectives because Rierson afraid of rough stuff—before
shifted individual in office being booked, had feet on
desk—I asked him 3 times—then flipped feet
he complained flipped upside down when refused to empty
pockets
seemed like I was always trying to convince him that
I was way I am not way he pictured me—
if I was right, I went to hell and back to prove I
was right, if I was wrong I took my ass chewing
after Bigfork 4 July riot said he and Brock used too much
force—arrested 1, pushed another half length of
Bigfork—2 of them Brock and I pushed—Rierson gave them
ride back to Bigfork—they never pushed down
man I arrested Rierson pushed him out back door
we ordered by Rierson to clear out town of
Bigfork—people who did not leave were arrested—
Jack Ulrich, possee member 6-3 250 lbs. other
1 shorter—not in uniform—asked to leave you said
don't have to leave said will arrest—who—he laughed
next thing he knew he was in a come along hold—
can put on him without hurting, if didn't have training
would probably have to go hand to hand fisticuffs with him

arrested, handcuffed, taken away (5 in office)
(July '74)—Al said he too aggressive, used too much
physical contact—people had closed off street taken over
town—12 highway patrol plus sheriff department decided
to
retake town—
asked Rierson how many riots been in? none—20,000 vs.
500 MPs Okinawa December '70—2 others—(72 Okinawa
back to
Japan)
when GI ran over Okinawa girl
confronted Sible about it—talked about Salisbury's re-
ports—
he felt doing what could—(Sible not investigation
trained)
what about female complainants, told me if Jim
Mitchell—
when Mitchell returned Salisbury gave him letter,
Mitchell
denied—
meanwhile confronted Rierson regarding Sible and me—
Sible
had said
should go to patrol since "sloughing off" in detectives—
told Rierson letter justification shaky, didn't want patrol,
Rierson said Sible handling, not getting involved—
I can see as I look back now I should have taken
more aggressive stand—may still have job there—
probably going to work out for best
also with Rierson he brought up Sible investigation—
night
before contacted ex-wife got statement, followed me back
down took original—he wouldn't let me out of sight to
get
it—
next day Max asked Sible and other detectives who

complained about my demeanor—Sible said this spring you
had female complainant in county car spent two days Woodland
Park
at time he under Bob Soderstrom—got from Christian—
Max and Christian confronted by Greg Paskell—he requested
Max regarding divorcee and six-year old son with ex-husband
from Oregon
to visit—has history of taking boy and not returning—been
physical broke door set ex-wife's attorney's car on fire Oregon—
have verbal court order Salansky to escort lady and tail
during visit two hours two days—approve Sodie—did just
that
met at Paskell's office—told both husband and wife estranged—
two afternoons—Paskell will verify—
also got letter from earlier informant—
if Rierson wanted to support S. Sible wanted to believe
I didn't want to work for sheriff—
July 1 transferred back to patrol—
Christian had witnessed Paskell conversation—knew having
marital problems
I couldn't believe this was happening to me
R 25 equals John Knapp at lunch
(Christian has hell of a driving record—5 or 6 cars wrecked—
smashed hubcap John Christian driving award—
when we worked together I drove 90% of time—he
told me longer in pursuit more excited I get
not long after quit he chasing misdemeanor violation he wrecked—

from that day on he was a working fool—he
was a go-getter
Max and Mitchell used to be real close—he had
wagon Max helped—when I quit, closer to election
further apart we got—I told Jim how I felt—
I had a career going there almost 9 years
that was my career—don't tell me to let
bygones be bygones when I'm forced to end
my career because we have a thief being supervisor

from time to time he would bring up memos—was going to
start—

we were evaluated by supervisor—discussed—never once did
I have a bad evaluation—never saw personnel file once
gave to him, he took it back—

no control over files—

Rick Stewart—van Crimestoppers
—rifle murder weapon

home after 8:30 P.M. and this afternoon

* * *

ENTRY

who with governor would handle—

governor—or Ron Clark—from officer present—
home 443-2883
AG—requested grand jury investigation—
call Denny
*General—Montana National Guard—
*two men watched him tear up booking sheets
one took torn up sheets, tried to match fingerprints
Martha governor in Billings
Ron Clark: he's right here
Dave Wanzenreid: governor met with officer and private citizen

in Kalispell at their request in October. Set up
through Ron Clark at meeting number of verbal
allegations made against Rierson—some materials they
wanted to provide governor—he said they
not able to investigate—pre-election timing
poor—said information given should go to county attorney—
they did provide him with some written materials—
same information to county attorney—commission on
campaign practices
he kept it here—all other investigating agencies
have received information—person with governor has information
governor made it very clear agency responsible not governor—
would he serve as a mailman—had to go to county
attorney—if had
would hope would give him same information—
will be here til after 5—home til [previous word "til" lined out but still readable] after
6:30
442-1288

ENTRY

12/1 Lympus
I sent them all to Greely—
I don't even remember what he said—

I wasn't aware of that—or of particulars of
investigation
if he has allegations like that he ought to
send them over to Jack Lowe.

you recommended polygraph Debbie Sible
Debbie Lipp—his daughter—

837-4259: Warren Sible

* * *

ENTRY

8:00 A.M. on Sible and Sarah.

ENTRY

Max—quit August '81
Sodie quit
Came forward after election to avoid
election—I'm not going to benefit by it—
Nobody's going to benefit by it—just want to know.

ENTRY

Warren Sible—sick 12/2
Dale Walters—out in car
543-7231
Western Montana Criminal Justice
1:00 P.M. Holiday Inn
LEAA
I certainly didn't pick up anything in there.
No, sir, I didn't. That's awful bad.
Could be liable for lawsuit.
Yes—talked to sheriff—told him didn't know
anything about it—at that point nothing more
ever came of it—because sargeant might have been some personal problems between
it sure as heck is a false deal—if anything were to come out on this, I
definitely would hire lawyer—slander, not true—
as law enforcement officer, don't think it's very good thing
to have pushed around—
Curt Snyder was sheriff—in Arizona now.

ENTRY

Sible; 9:00 A.M. no answer—I'm not talking to you while
I'm home

sick—I'm tired of you god damn reporters bugging me at home.

* * *

ENTRY

Rierson attorney: son-in-law Great Falls

543-7231
Sent to county attorney's office—to my knowledge
it was—no access to those files—

ENTRY

Fritz Behr: sent to Political Practices Commission—why?
What about their claims can't handle it?
What law governs?
Requested 81 to investigate Flathead County Sheriff's office?

(Kathleen—notice of new publications—Steve Woodruff—)
Dan Schoolditch—can't comment on
whether got them or not—
cannot make comment—
not that I'm aware of—

ENTRY

Lympus—whether he received investigation report from Sible
affair. —do you want Salisbury statement?
Salisbury—ex-wife's statement?—gave it to secretary and
commissioners and
Sible, Rierson—Sto
give statement to Rierson?
Christian with you on Sible case?
(she said didn't matter whether she contacted—didn't remember—they divorced –Bill's stuff his—
Bill said Sible had contacted ex-wife—she said can't remember—been 7 years)

If came and asked, probably would have given it or made him
one
Later stopped Deist asked her she contacted Ted he said
limitations over—at minimum should have returned and disciplined
something should have been done to rectify the situation—
time when I talking to him with regard to patrol reassign-
ment, letter. He asked
about Sible investigation—I got statement from wife—got
original

ENTRY

Fritz Behr: not in town—back late Friday or Monday
Salisbury
Rierson wanted to know—called in—John Christian
submitted statement—Salisbury saw coin in
light, walked straight out—
I seen it, it registered,
Al Rierson
creditors after Salisbury

* * *

ENTRY

Sible was investigated—wasn't covered up—13 years ago.
He and Bob Brandewie hunting by Echo Lake—this old
thing sitting here—property for sale—that only thing
left—he called number there his wife—
Brandewie owned Mountain Lake Tavern—he gave to Bob—
Bob gave it to me—
I don't know why—he never did contact me—
why wait 14 years—Brandewie contacted [word "contacted" lined out] died

Max seems to feel I took it—because I called
his wife and asked about it I took it—
problem with Max—really striking out—didn't walk
out on best of terms—
his own partner said he carrying on personal business
with women while working—had meeting—Johnny
confronted him with it—
when I took over Soderstrom left—isolated cases he
going back after work supposedly guard
if we had to dig into it, I think we could—
talk to John Christian
before divorce final he married other girl, remarried—
Max had had more than his share of problems—
all he'd had to have done was ask me about
it—he has never talked to me—trump up
things—wasn't keeping up with case load—every
else 50% cases cleared—others 10%—
if stop in, will show how it works—every case
on rotational basis—if check with guys in department
will find out—
letter to union had meeting his caseload not
holding up—he fought against that—
Christian—
Al didn't have grounds to fire: sleeping on duty, direct
negligence of duties—was best administrator going, since
not doing good job
basically he's pretty easy
that's putting me in libel position—will sure pursue
with legal action both against Max and against the
paper—
there's a lot more here that doesn't come to light
if it all came to light I think Max would
really end up on short end of stick
Warden
he told me yours just a minor part—way it
turned out mine was only one—I certainly don't
want to get mixed

never been Mountain Lake Tavern once in my life—
there was a bunch of hippies in there so I never went back—
don't know any Brandewie at all
they'd forget about it I'd forget about it
of little value—
that's certainly not right
Max's problem: he disliked Sible—they had personality conflict—
Christian was Max's partner—backed out of
him too—it's fine to go after someone if you got something
big on them—I never did really believe in this little crap
I didn't ask for it back—I was probably mad
at time—so mad probably would have wrapped it around his
head
I certainly wish no bad things for any of them—
I wish they all could have worked differently—I
thinks it's better off buried myself—

No secret around town that Sible got away with my smokehouse—they all stayed away from me—
don't have any particular love for Al Rierson—he's elected [word "elected" lined out] out of office—no bad feelings whatsoever
about it—I just think it ought to be buried—

accusation about women is false—[name deleted] [2]
having affair with—rumored

—Sible ever discuss with you?
after—last night—talked to Rhodes—
(Chuck was going to use that plus other things to remove Sible)—
why not hunt up Bill and return smokehouse?

Christian: we investigated child molesting

---

[2] Certain names of persons not central to this action have been deleted for purposes of this Appendix only due to possible privacy concerns.

April '81 another lady filed complaint through friend who was
church friend of John—he brought it into department—said
we had complaint, know who suspect is, didn't register
til talked to mother of victim—victim about 7-8 got
hysterical when saw [name and facts deleted]
John and I talked to her—it was ex-wife he dating—
Salisbury knew two boys and mother—mother said didn't
want anyone but me interviewing her boys in that situation—
I interviewed different times—she also gave statement to John—
boys wouldn't reveal everything at one time—in official capacity—
gave John that tape—led to guilty plea—I
tried to stay out of it til she asked for his help—
Mitchell told Sible Max shouldn't have been involved—
maybe I shouldn't—since was, handled very professionally—
the boys would reveal bits at a time,
no doubt Karen and I having problems at time but I thought
they
would give me credit—
he knew [name deleted] having affair with [name deleted]—
7½ years—just after Dan Yourman hired—while
Rierson still in office.

* * *

ENTRY

Al
that's a damn lie—everything gathered was
taken over to the county attorney—there was some
question of identification—supposedly Fishhouse—
some
it was a confused situation all around—county
attorney said as far as he concerned

Salisbury just a sorehead—he transferred to patrol and quit
was judgment he wasn't [word "wasn't" lined out] was goofing—
wasn't getting reports
he was put in when Soderstrom left—he
putting things in your mouth just not true—
Sible mad about going from patrol to detectives

I know that his accusations had [illegible word] grounds
for criminal—administrative conduct—some questions
on validity ex-game warden's wife—we
had California statement—we came up with
nothing to hang our hat on—
the guy that supposedly thought he could identify
didn't want it back—
even in the investigation—there was hard
feelings there Salibury was trying to make
something out of nothing—
if I told him anything it was what the
county attorney told us—if no further need for
investigative action that was it—
these guys are picking away at stuff as
much as 12 years back—Snyder's administration for these
guys to be a bunch of soreheads hang their hat
on their crazy—you'll find some in any
administration—soreheads—winners
it's my judgment that you have nothing of
criminal nature—nothing of administrative nature—
he didn't want nothing done about it
you know enough about proof of article—unless you
have positive proof investigating officer—court's will agree—
probable cause—you got nothing to hang your
hat on
we've had to prove [word "prove" lined out] return stolen
property to thief because owner couldn't prove it his

Park Inn—merchandise on DWI—illegal
search—t.v. set—

ex-wife—she

nothing administrative—or criminal
example Freebury—ten days off—Eureka—reckless driving
county attorney said off duty no responsible

we checked it out from A-Z—that's part of
administration of employees—

* * *

ENTRY

spring '75: Dan Yourman just started
Dennis Hester—

Bret Davis: Ken Obendorfer
Great Falls—IDS insurance deputy
Davis was doing theft investigation
of tools stolen out of pickup
Obendorfer worked with him
fight at El Rancho
Dixie Inn, March '82
John Bothe—lawyer—
Dana Christiansen—for Walters—
he was suspended, reimbursed?

Roy Cooper case—Soderstrom and he main investigators on
that case—
3-4 days on crime scene—learned they picked up in
Idaho—trip involved—Sodie/Salisbury went to interview with/
Rierson—7 hour interrogation, had evidence—girl broke—
March—April '81—6 day drug spree Doc Brock John self
Whitefish police department—drug bust Whitefish—Martin
City—Coram: 6
arrested approximately

Johnson—Flathead Electric Co-op—meter backward—
over 10
years ago
saddle—phone bills—2 saddle blankets from Frank Shepard
Glass,
he said at Denny Roths
Chuck wants to review—
Rierson discussed Sible at time of transfer—he allowing Sible to handle? [question mark circled]
Keller response to Sible letter June 1981

* * *

ENTRY

Rhodes—(feel misleading information possible—original records
probably going to be destroyed—individual

ENTRY

Max wait til after year
if brought out now, will put him on spot

* * *

ENTRY

[an arrow pointing right] Salisbury resigned August '81 not
July.

Jack Lowe: nothing to say—29—
(reason nothing formally done—still negotiating with/ AG's office over investigation—should.

* * *

ENTRY

Rierson: (everything gathered was taken over to the county
attorney)
he sent back for more investigation

[next two lines lined out but still legible]
(there was some question of identification of smokehouse)
victim says positive identification [end of line out portion]
(we had statement from ex-wife in California given to officer there)
she not in California—saddle case?
(he didn't want anything done about it)
didn't he ask for administrative action?
(Soderstrom and Rierson told Salisbury to investigate as any
other case)
why if case already closed?
(Steven's burglary—case closed after Salisbury left?)
what happened?
(reopened before election?)

Notebook No. 52 Dated December 13, 1982 through January 14, 1983

* * *

ENTRY

Sible smokehouse deal—12-13 years ago? Max says 74—
14 years ago—to begin with/it was 4
pieces of concrete and plywood—
Bob Brandewie—dead for 8 years ago got it from Bill? He
says never knew Brandewie,
only in tavern once—
still have smokehouse? I sure do
Bill had drinking problem—
he has never contacted me or I would have given it
back to him—would have g ["would have g" lined out] I've
never talked to him
don't even know him—
didn't hear about it til a month after he
quit/was quite surprised to hear about it—
nobody knew anything about it—
no report into September—

I think I used it four times—put roof on it,
painted it—used it two years haven't used it since
two feet by two feet wide by three feet

Max primarily concerned, didn't know how would affect—

257-3892

752-1253 Bill Eckerson

April—May '74—didn't positively identify he didn't deny it—
he talked to Sible about it—it was '73-'74 I lived
in Big Fork—home made—no identifying marks on it—
went to
Big Fork Inn
near as I could tell—I think something should have been done

from an administrative angle—never did want to get into anything from a criminal angle—
I told him he had personnel problem—he got pretty hotty about that (didn't take criticism to well)
I told him also that I didn't want to hear
anymore about it—
he already aware of smoke house deal—
I think everyone in town was aware of it because
I was pretty vocal about it—I told him didn't
want to get involved—he said no need—as time
went on it looked like this was only thing he
had against Sible—when Christian backed out, thought Max vindictive—don't like to get involved in
anyone's vendeta—I like to keep things on
course—even if I don't like the guy I

* * *

ENTRY

she waitress in restaurant—husband cooking—kids busing tables
lady who [illegible word] it familiar to Christian—Max happened about time of burglary—Ester has statement

they still accused of petty theft plus petty burglary—they trying to go straight—
they quit after burglary—he [word illegible]—she also OSO Chico
when she
she visited August learned of burglary—very shocked, said heard kids planning
bonds—art photos—jewels—coins
$150.00—
in bottom drawer of jewelry box was combination to safe
it was a half assed burglary it doesn't make sense—
I'm going to the newspapers—the voters did the rest—
he thought it was chicken shit that I wasn't helping law enforcement
reason was I didn't trust them—I figured it would get lost in the shuffle everything else did—

If caught them probably would have done something foolish—
but
from August 25 ["August 25" lined out] October '82
WK—Maxine Lamb identified self from sheriff's office said we're reopening case—
so contacted Salisbury again—he did not understand either—

After store keeper identified he had suspicion
restaurant owner's son and friend—17 or 18—
Salisbury said was going there next—was reassigned to other cases—don't know why he reassigned—
only personal thing would be Dutch Taylor—forced to terminate through harassment at one of Schwinden's $100.00 plate campaign dinner Rierson accused Taylor of stealing art from prisoners, selling at profit—
the 2 owed $1,500.00—$2,500.00 in art supplies for prisoners—Stephens bought paintings from

I was honestly pissed that my weekend was
interrupted—life goes on—insurance covered less than
5%—$1,200.00—I'm not a detective, I'm an
artist—I had faith that they had ["had" lined out] would
cover it—had a suspicion Rierson being
a media hound would take credit for

I did not feel intimidated—I did ["did" lined out] was not
treated unkindly—only when contact ceased,
detective transferred to patrol, I became alarmed—
I disagree with Lamb that I'm withholding evidence
because I want out
I did not spend every conceivable moment
fretting about my burglary and I think anyone who
does is stupid—
wanted to know what offense he committed
to be put on patrol, then private sector
I hope next administration in there has more
personal contact with complainants.
As public figure did not think it would behoove
me to call 3-4 times/week hounding them
I have a feeling I was a victim of
piss poor administrative turmoil—that had no
bearing on my case—suffered horrendously
I think that is a shame and I want to
know why—
why should I go out and get a statement from
somebody who just happened to walk into my life—

radio—$12,000.00 diamond ring missing from Taylor's
trailer fire—
would you run right out to that sheriff and
expect
why sheriff go down to prison to get statements
the description of 2 people matched statement of
woman of 2 people designing crime—
statement woman in August '81
right after burglary Salisbury in touch on weekly
basis—when he came up with these 2 suspects—

shortly thereafter contact ceased with/Salisbury
3-4 weeks after March-April weekly contact ceased
by May total contact ceased
I inquired where he was—came upon him in
patrol—he depressed—
then I tried to contact Max further after I
had taken statement from lady early August or late July
I ran into Max mid August he no longer on
force—working security Outlaw—
I asked Max what had happened, told him
statement we had taken—it matched 2 in
statement we had taken

had no received contact from sheriff's department except
4 phone calls each one saying didn't need my
evidence anymore—come pick it up—I had
no use for them—last three times asked why no need,
why selling—they said no reason to keep—they
done with/it—I said I don't have any use
for a safe that's had the door chiseled
open—no other contact til May '82 when
asked 4th time for permission to sell—

August '80—
pension Miami—non-combat Rierson making
look like combat
the man was lying to me—am I going to
take him evidence when just shit canned a detective
who just ["just" lined out] may be 30 days away from
solving
a $25,000.00 burglary?
people are blinded by the name tag—
I'm more pissed at him than burglars—
I did asked around
am I going to go to Warren Sible when
Dutch Taylor says Sible and Sheriff took ring
you've gone straight to sheriff you've come back
mystified, things don't gel

I think after almost 2 years I have been very
patient and very understanding and that's why I am now
talking to the media
I think I became very much a victim of
mismanagement and turmoil from within—
radio, police written off as destroyed Rierson
took it, had repaired—Al Hale radio barn U.S. 2
Al took it home—ring disappeared—
Pat took both—that A.M. in shop—
evening ring gone—tool shop—
hindsight is always so 20/20
people have a tendency to say well I
would have done—
would you call up the sheriff and say why did
you steal my ring—

August '82—didn't understand why closed
week October 20, '82—

August '82—bumped into Salisbury at Outlaw—he
said concerned about burglary—Max concerned about
other things too—
I ran into Max—came back to burglary—Max
asked about it—he said no, got statements.

Hopes for new administration—pursue then
he responded with all kinds of different cases—involving
intimidation—Ester and I started inquiring—he started
giving me names of officers—Updegraf, Fister,
Obendorfer—Hayden—self—
Ester and I started asking around to find out
what going on—as began talking to
officers each had a statement—they started
coming to talk to me—said we're afraid, of
reprisals, can you use influence to help us—
I would like to get my money's worth as taxpayer
no ill feelings, no vendeta—volunteered to help—
they began preparing statements to best of their ability—
bringing to us

Updegraf told about intimidations
Stephens suggested go to Governor—Updegraf said go to consult other officers—all agreed wanted support—
Updegraf's wife—Stephen's wife—Ted was
extremely helpful, interested, middle of road, said file with county attorney—that gave at least officers
support they weren't lost in shuffle, already ["already" lined out]

never in any way did they appear out to get
anyone—I don't think any of these guys
up front have a vicious bone in their
bodies. I do feel that they have
been wronged in many ways
I think they feel if they're going to go
out and bust somebody for a half gram of dope
then they're at least going to have complete
honesty and clarity in their supervisors

ENTRY

February 19, '80 between 3:30-5:30 P.M. apartment
burglarized $25,000.00—safe and contents, jewels
documents, bonds, cash—inexpensive jewelry
from bedroom—left $15,000 in expensive jewelry—
doesn't that seem odd—not vandalized not
juvenile, not professional either—built into an
end table cabinet approximately 500 lbs.
a difficult place to case plus no pattern to my
lifestyle—he at folks celebrating Esters birthday—
gone from noon til notified 1:00 P.M. next
day burglary—people downstairs noticed door ajar
Rick Fister reported about 2:00 P.M. Saturday—initial report
Salisbury responded about 3:00 P.M.—several other officers showed—
within 5 days found safe—near Kila old railroad grade—
lady who gave statement and husband lived out

there—had been bad assed—trying to go
straight last 2 years
mother of one of kids that did this
had kids dump safe out by grade where
they lived
Max identified tool chisel plastic handle—
found where purchased and 2 people who purchased—

ENTRY

Rierson on Stephens' story—
27th Al in town—
Warren Sible: in a meeting—

* * *

ENTRY

Stephens: 12/30 Ted made in clear he got a
attorney did [word illegible] no legal mumbo jumbo—
admitted worst ass chewing he ever had was
from Rierson over crime board thing—made it clear
he no legal power other than stays of
execution
you very good in bringing it to my attention—should
go through proper channels—to county attorney then
possibly to AG
he was very fatherly, very understanding, did not take
sides—was very clear ["clear" lined out] stoic
every time officers went to attorneys they were shunned
til charges became public—
13th—a week or 2 weeks before that—the
Friday of Main Street dedication

* * *

ENTRY

General Duffy—Great Falls—
Dennis Updegraf—Rick Fister

* * *

ENTRY

Jack Lowe—you turned over to AG's office—they told me hangup was contact with Lympus—
Greeley—
not much our office can do about it—
general problem—
nobody at state level can do anything without authorization/
cooperation
of county attorney—never had conference with him—

[That ends Book 52 and takes up to January 14, approximately 2 weeks after the story appeared. The last 2 entries are simply to show that I continued to follow-up on this story.]

Telephone Notes

Entries from notebook of telephone notes commences in November of 1982.

[Explanation—I have a phone in my upstairs office where I
do most of my work, but I occasionally take calls on the downstairs phone and I keep a notebook hanging by the phone
in which I can take notes in order to save the time and inconvenience it would take me to go upstairs to my office to find my notebook and possibly risk losing a call from an
informant who would get impatient while waiting.

These notes are in chronological order but unless I happen
to write a date next to an entry, it's difficult to fix a precise date for any particular entry.]

ENTRY

11/22 329-3011 Regional Forester

257-8761 Tuesday called Dennis Updegraf—set up meeting
tomorrow night—hear tape—(read transcript)—he will/ tell all give list
of 27 people—Attorney General refuses to talk to him any
more—Jack
Lowe still in political investigation—came over heard people—said hands
tied—spoke of beer in pickup gals to Outlaw—State will postpone
til January—Al to Mexico—he from oil family eastern Montana—38% of Montana
tax paid by oil—adds $30,000.00 plus income $18,000.00 —he
also promoting friends, withholding others—manipulating
budget—trying to avoid complainants—call after 5

* * *

ENTRY

Updegraf [arrow pointing to right]
tape as proof—of intimidation—he implicates Stephens—Fister
Tom Frank [arrow pointing to right]
Obendorfer
meeting with/governor—
Esther and he took statements

* * *

ENTRY

[message taken for me in my wife's handwriting]
Fritz Baer
Montana Attorney General
11:30
449-3874

ENTRY

Behr rested with commissioner on political practice—
Margaret Krevik—Montana Code clearly states
those kind of allegations must be investigated by
the Commissioner on Political Practices
Since that time I have not been involved
in it at all—
not me or my division—
that's my reading of the statute of course
I'm not a member of the Montana Bar
Montana Code 13-37-111(1) Commissioner Political Practices
shall be responsible for investigating all alleged violations of
election laws Chapter 35-37—shall in
conjunction with county attorney be responsible for enforcing
those laws—coercion, undue influence
unlawful acts of employers—employees
all I had available were letters and statements
sent down—my reading of them indicated would fall
within those rather than intimidation statute—
intimidation statute not specifically geared toward this—
more like kidnap—

* * *

(6)

No. 86-1638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEE ENTERPRISES, INCORPORATED, a Delaware Corporation and DONALD SCHWENNESEN,
Petitioners,

v.

WARREN E. SIBLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

---

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

I. INTRODUCTION

Petitioners filed a Reply Brief. As an appendix to that Brief, Petitioners have introduced material to this Court which was not part of the record below considered by the jury, trial court or the Montana Supreme Court. Counsel for Respondent received Petitioner's Reply Brief and the Appendix on June 15, 1987. Upon receipt of the material, Counsel for Respondent called the Clerk of this Court and ascertained that Petitioner's Petition for Certiorari would be considered by this Court

on June 18, 1987. Respondent wishes to apologize to this Court for the form of this Brief, but, due to the necessity of sending this document from Bigfork, Montana to Washington, D.C. for printing and the time constraints of presenting it to this Court before the June 18th hearing, Respondent's Counsel has been forced to operate under extremely adverse circumstances.

The sole purpose of this Supplemental Brief shall be to inform this Court of Petitioners' attempt to introduce evidence which was not before the jury, trial court or Supreme Court of Montana. It is Respondent's position that the Petitioners' Appendix to their Reply Brief should not be considered by this Court, at this time.

II. ARGUMENT

Petitioners have filed an Appendix with their Reply Brief which, for the first time in this case, purports to be a transcription of reporter Schwennesen's notes relative to the article. This Court should not consider the Appendix at this time for the following reasons:

1. Respondent Schwennesen has not been examined on the notes and the effect of his testimony has not been considered by a jury, the trial court or the Supreme Court of Montana.

2. The transcription of these notes was accomplished by Petitioner Schwennesen, without an opportunity to examine him about the transcription process.

3. Even if the notes were admissible at this level, Respondent still would be entitled to examine Schwennesen about the notes and his pre-publication knowledge, engage in additional discovery based upon new information and persons mentioned in the notes, and have a lower court jury determine the effect of this pre-publication knowledge and notes on the actual malice question.

4. By introducing this material at this Court's level, the Petitioners are attempting to transform this Court into a trial tribunal.

III. CONCLUSION

It is respectfully submitted that this Court should disregard Petitioners' Appendix to their Reply Brief and any argument based on the Appendix's material. It is further respectfully submitted that Petitioners' attempt to introduce this material—i.e., Schwennesen's notes—demonstrates that a retrial is necessary to obtain a complete record for this Court's review, and that the Petition For Certiorari is premature.

Dated this 17th day of June, 1987.

Respectfully submitted,

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vs.

WARREN E. SIBLE,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Your amici respectfully request leave to file the attached brief on behalf of the American Newspaper Publishers Association, the American Society of Newspaper Editors and the Reporters Committee for Freedom of the Press in support of the Petition for Certiorari of Lee Enterprises, Inc. and Donald Schwennesen. Petitioners have consented to the filing of this brief. A copy of said letter of consent has been filed with the Clerk of this Court. Respondent has declined to consent to the filing of this brief.

The American Newspaper Publishers Association ("ANPA") has over 1,400 members throughout the country, including numerous newspapers in Montana. The American Society of Newspaper Editors ("ASNE") is the nationwide, professional organization of daily newspaper editors with 950 members nationwide, including numerous Montana members. The Reporters Committee for Freedom of the Press is a voluntary association of working journalists dedicated to protecting the First Amendment. All three amici are gravely concerned about the impact of the Montana Supreme Court's decision in this case upon their members.

Your amici are familiar with the questions involved and the scope of their presentation and believe there is a necessity for additional argument as to whether the Montana Supreme Court applied an unconstitutional standard in reviewing the evidence of actual malice, and whether that court failed to properly apply the definition of actual malice as set forth in this Court's opinion in *St. Amant* v. *Thompson*. Additional argument is particularly appropriate in light of Petitioners' request for summary reversal. The attached brief sets forth additional authorities which are presented in order to assist this Court in summarily deciding this case on the merits.

Because of the important issues of Federal Constitutional law presented in this case, your amici urge this Court to grant the Motion for Leave to File the attached Brief Amici Curiae.

Respectfully submitted,

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association, the American Society of Newspaper Editors, and the Reporters Committee for Freedom of the Press submit this brief *amici curiae* in support of the Petition for Certiorari filed by Lee Enterprises, Inc. and Donald Schwennesen.

INTEREST OF THE AMICI

American Newspaper Publishers Association ("ANPA") is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation in the United States. Numerous newspapers published in various parts of Montana hold membership in ANPA.

Concerned with the issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. The Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to the information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Reporters Committee for the Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to protecting the First Amendment and freedom of information interests of the news media and the public. Since its founding in 1970, the Reporters Committee has appeared in virtually every significant press freedom case considered by the U.S. Supreme Court.

The decision of the Montana Supreme Court in the instant case, while clearly an aberration, represents a serious departure from libel jurisprudence as established by this Court, and, therefore, is of significant interest to the members of ANPA, ASNE, and the Reporters Committee for the Freedom of the Press, all of whom cherish their right and their duty to inform the public on matters involving the conduct of public officials.

Your amici appreciate this opportunity to present these views, and we urge this Court to grant the Petition for Certiorari and to summarily reverse the opinion below.

SUMMARY OF ARGUMENT

Summary Reversal.

In reversing the jury's verdict in favor of the newspaper, the Montana Supreme Court committed two serious constitutional errors. The court conducted a review of the evidence in the light most favorable to a libel plaintiff who in this case was the losing party. Such a procedure is directly contrary to this Court's decision in *Bose* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). The court also rejected an actual malice jury instruction based upon the verbatim language in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). Where an order abridges freedom of the press in violation of the First and Fourteenth Amendments, summary reversal is mandated. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311-12 (1979) (Petition for Certiorari granted and judgment summarily reversed where court's order abridged First Amendment).

De Novo Review Under Bose.

The court below failed to conduct an independent review of the evidence as required by this Court in *Bose* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). Instead, the court below viewed the evidence in the light most favorable to the plaintiff who in this case was the losing party. Independent review means *de novo* review, *id.* at 508 n.27. The rule of independent *de novo* review is never satisfied by viewing the evidence in the light most favorable to a libel plaintiff, particularly where, as here, the plaintiff was the losing party at trial.

Rejection of the St. Amant *Instruction.*

The Montana Supreme Court's rejection of the *St. Amant* jury instruction, and the court's refusal to even acknowledge the existence of the case is clear error requiring summary reversal.

Reversal of the Jury's Verdict.

The court's reversal of the jury's verdict in favor of the newspaper violates the First Amendment. Acting on proper

instructions, the jury below performed its historical function of protecting freedom of expression from improper judicial interference. Where the jury has acted to protect freedom of expression, the court should not interfere. See Parker, *Free Expression — The Jury Function*, 65 B.U.L. Rev. 483, 495 (1985) (and authorities cited therein).

ARGUMENT

I. THIS COURT SHOULD SUMMARILY REVERSE THE OPINION OF THE MONTANA SUPREME COURT BECAUSE OF THE TWO GRAVE DEPARTURES FROM ESTABLISHED CONSTITUTIONAL PRINCIPLES IN THIS FIRST AMENDMENT CASE.

In this public official libel case, the court below reversed the verdict of a unanimous jury which found that the newspaper did not publish the article with actual malice. In so doing, the Montana Supreme Court committed errors of Constitutional magnitude which are so blatant as to warrant summary reversal under Supreme Court Rule 23.1. Where the order of the court below abridges freedom of the press in violation of the First and Fourteenth Amendments, summary reversal is particularly appropriate. *Oklahoma Publishing Company* v. *District Court*, 430 U.S. 308, 311-12 (1979) (Petition for Certiorari granted and judgment summarily reversed where court's order abridges freedom of the press).

The first and most obvious error committed by the court below is its failure to apply the proper standard of review mandated by this Court in *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). Despite this Court's clear pronouncements in *Bose*, the court below failed to conduct an independent *de novo* review of the evidence of actual malice. Instead, the court viewed the evidence in the light most favorable to the plaintiff, who in this case was the *losing* party.

In *Bose*, this Court held that a reviewing court is not to defer to the trier of fact's affirmative finding of actual malice, but

"must exercise *independent* judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. at 514 (emphasis added). The rule of independent review is designed to protect libel defendants to ensure that a libel "judgment does not constitute a forbidden intrusion on the field of free expression," *New York Times*, 376 U.S. at 285 (footnote omitted). The independent review required by *Bose* is not satisfied by reviewing the evidence in the light most favorable to the plaintiff, particularly where plaintiff is *not* the prevailing party.

The second and equally serious error is the Court's rejection of the actual malice jury instruction which was taken almost verbatim from this Court's opinion in *St. Amant* v. *Thompson*. In refusing to follow *St. Amant*, or even to acknowledge its existence, the Montana Supreme Court has departed from the firmly established definition of actual malice in a manner unprecedented in libel jurisprudence.

Because of these egregious constitutional errors, this Court should grant the Petition for Certiorari and summarily reverse the court below.

II. THE MONTANA SUPREME COURT FAILED TO CONDUCT AN INDEPENDENT *DE NOVO* REVIEW OF ALL THE EVIDENCE GERMANE TO THE ACTUAL MALICE DETERMINATION.

The Montana Supreme Court applied an unconstitutional standard of review in direct contravention of this Court's pronouncement in *Bose* v. *Consumers Union of the United States*. In its opinion below, the Court stated:

> First, we must review the evidence in the light most favorable to the appellants and then determine whether the Court's instructions adequately presented appellants' case to the jury.

Petition for Certiorari, App. A at 2.

This Court has never addressed the question of the proper standard of review where the plaintiff is the *losing* party as is the

case here. *Bose* makes it clear, however, that a reviewing court must never view the evidence in the light most favorable to a libel plaintiff, but at a minimum must conduct an independent *de novo* review.[1]

A. Introduction: The Constitutional Rule of Independent, *De Novo* Review under *Bose*.

This Court held in *Bose* that a reviewing court is not to defer to the trier of fact's affirmative finding of actual malice, but "must exercise *independent* judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. at 514 (emphasis added). In earlier cases, including *New York Times*,[2] this Court had noted its own obligation to

> examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." . . . We must "make an independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

376 U.S. at 285 (citations deleted) (footnote omitted).

In *Bose*, this Court emphasized that this obligation of independent review "is a rule of federal constitutional law" that binds not only the Supreme Court, but any court reviewing a libel

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[1] Your amici urge this Court to adopt the rule that where a jury finds an absence of clear and convincing evidence of actual malice, that the reviewing court is prohibited by the First Amendment from overturning such a verdict. See Argument IV, *infra* at 15. Regardless of whether this Court adopts the rule outlined above, it is beyond question that the Montana Supreme Court's disregard of *Bose* is grounds for summary reversal.

[2] See also *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (Opinion of Brennan, J.); *Time, Inc.* v. *Pape*, 401 U.S. at 284; *Greenbelt Cooperative Publ. Ass'n.* v. *Bresler*, 398 U.S. 6, 11 (1970); *Beckley Newspapers* v. *Hanks*, 389 U.S. at 82.

judgment. 466 U.S. at 510. The rule of independent review, this Court explained,

> reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. *Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold and bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."*

Id. at 510-11 (emphasis added).

Independent review, this Court emphasized in *Bose*, means "*de novo* review." *Id.* at 508 n.27. Even though the actual malice determination turns on "largely factual questions," *Id.* at 501 n.17, it " 'involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind.' " *Id.* at 507 n.25, quoting *Roth* v. *United States*, 354 U.S. 476, 498 (1957) (emphasis in original). The "stakes" involved in that judgment — "in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact." 466 U.S. at 501 n.17. Reviewing courts " 'cannot avoid making an independent constitutional judgment on the facts of the case.' " *Id.* at 508 n.27, quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (Opinion of Brennan, J.). And that judgment is to be based neither on what the trier of fact found nor, in the case of jury trials, on what the court presumes the jury found. It must constitute the reviewing court's "*independent assessment . . . of the evidence germane to the actual malice determination.*" *Id.* at 514 n.31 (emphasis added).

B. The Rule of Independent, *De Novo* Review is Not Satisfied by Reviewing the Evidence in the Light Most Favorable to the Plaintiff.

The independent review required by *Bose* is quite different from the standard generally applicable to appellate review. Ordinarily such review requires the court to view the evidence in the light most favorable to the prevailing party, and to give that party the benefit of all inferences that can reasonably be drawn from the evidence. The ordinary standard permits an appellate court to review the evidence giving all permissible inferences in favor of the prevailing party is met only when the evidence, viewed in that light, is so one-sided that reasonable men could not disagree on the verdict. That standard of review, which imposes a heavy burden upon the appellant reflects the deference generally accorded to a jury verdict and the presumption in favor of its validity.

By contrast, the review required by *Bose*, where a jury has found actual malice, is independent, "*de novo* review." 466 U.S. at 508 n.27. The reviewing court's judgment is "independent" of the trier of fact's decision, and uninfluenced by any deference or presumption in favor of its validity.

In *Bose*, a case tried to a district court judge, the Court held squarely that the clearly erroneous standard of Rule 52(a)[3] is inapplicable to the review of an actual malice determination.

> We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v. *Sullivan. Appellate*

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[3] Rule 52(a) of the Federal Rules of Civil Procedure then provided that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

> *judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.*

466 U.S. at 514 (footnote omitted) (emphasis added). As this Court explained, the difference between Rule 52(a), which accords a "presumption of correctness" to the trial court's findings, and the constitutional rule of independent, *de novo* review "is much more than a mere matter of degree." *Id.* at 501. There is no "presumption" at all under the rule of independent review.

That is not to say that the role of the jury is eliminated in First Amendment cases. The jury's verdict is entitled to traditional deference with respect to many of the factual issues in such cases. "[O]nly those portions of the record which relate to the actual malice determination must be independently assessed." *Id.* at 514 n.31. This deference should be particularly strong where, as here, the jury found in favor of the defendants.

Bose and prior Supreme Court decisions, including *New York Times*, illustrate the proper application of the constitutional rule of independent, *de novo* review. In *Bose*, the issue was whether the defendant had disparaged plaintiff's stereo speakers by reporting that the sound they produced "tended to wander about the room." 466 U.S. at 488. The author of the report, Seligson, testified that the movement he heard was a "back and forth movement along the wall," *id* at 495, and that he intended the words "about the room" to describe that movement. "After careful consideration of Seligson's testimony and his demeanor at trial," the district court rejected his testimony that the words he used ("about the room") actually described what he heard ("along the wall") as "not credible." *Id.* at 497 (emphasis added). Because Seligson "knew" the words he used "did not accurately describe the effects that he . . . heard," the court found actual malice. *Id.* at 498. See also *id.*, at 511-512.

Had this Court viewed the evidence in the light most favorable to the plaintiff, it certainly would have upheld the trial

judge's findings. Addressing the significance of Seligson's testimony, this Court stated:

> Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made — that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication.

466 U.S. at 512.

In short, this Court brought to bear its own independent judgment and rejected the trial court's conclusion, *even though that conclusion rested heavily upon the trial court's explicit assessment of the demeanor and credibility of the principal witness* on the critical issue in the case.

In *New York Times,* a jury case, the Times had news stories in its own files that revealed the publication's falsity. 376 U.S. at 286-87. This Court did not view this evidence, and all inferences that could reasonably have been drawn from it, in the light most favorable to the plaintiff. Rather, it made its own independent assessment of the evidence and entered judgment for the defendant.

In *Time, Inc.* v. *Pape*, Time Magazine erroneously reported a civil rights commission's summary of allegations of police brutality in a private complaint as independent findings of the commission. 401 U.S. at 282. In a libel suit brought by one of the police officers involved in the incident, the district court granted Time's motion for a directed verdict. The Court of Appeals reversed, concluding that "the omission of the word 'allegation' or some equivalent was a 'falsification' of the Report," and that "[s]ince the omission was admittedly conscious and deliberate," the issue of actual malice was "one for the jury." *Id.* at 285.

Had this Court viewed the evidence, and the reasonable inferences therefrom, in the light most favorable to the plaintiff, it certainly would have agreed with the court of appeals that a

directed verdict should not have been entered. There is an obvious difference between allegations in a private complaint and findings of a government commission, and it presumably would not have been unreasonable to infer that Time "entertained serious doubts as to the truth" of its publication when it "consciously" chose to present what in fact were mere private allegations as commission findings. This Court, however, did not review the evidence in the light most favorable to the plaintiff. Instead, this Court assessed the evidence independently and held that Time was entitled to judgment.

These cases make clear that an appellate court's review of the actual malice issue is not governed by Rule 52(a)'s clearly erroneous standard, or by the standard ordinarily applied to motions for a directed verdict and judgment n.o.v., or the ordinary standard of appellate review. The First Amendment mandates that the appellate court must not review the evidence in the light most favorable to the plaintiff, particularly where the plaintiff is the *losing* party at trial. It must conduct its own "*de novo* review" of the evidence, 466 U.S. at 508 n.27, and reach its own "independent judgment . . . whether the record establishes actual malice with convincing clarity." *Id.* at 514.

The Supreme Courts of California and Illinois have recently addressed the issue of the appropriate standard of review of the evidence of actual malice and both have concluded that *Bose* requires independent *de novo* review. In *McCoy* v. *Hearst Corporation*, 41 Cal.2d 835, 231 Cal. Rptr. 518, 727 P.2d 711, 13 Media L. Rptr. 2169 (1986), *cert. denied*, ____ U.S. ____ (May 4, 1987), a unanimous California Supreme Court reversed a $4,500,000 judgment after conducting an independent *de novo* review. The court specifically held that:

> This court is not bound to consider the evidence of actual malice in the light most favorable to respondents [plaintiffs] or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry.

13 Media L. Rptr. at 2173.

In *Wanless* v. *Rothballer*, ____ Ill. ____, 13 Media L. Rptr. 1849 (1986), the Illinois Supreme Court similarly found that *Bose* requires an independent "*de novo*" review. 13 Media L. Rptr. at 1852. See also *Dombey* v. *Phoenix Newspapers*, 724 P.2d 562 (Ariz. 1986); *Gazette* v. *Harris*, 325 S.E.2d 713 (Va. 1985) (Bose requires independent review of evidence of actual malice).

The only court which has departed from the rule of independent review set forth by this Court in *Bose* is the Montana Supreme Court in the instant case.

III. THE MONTANA SUPREME COURT'S FAILURE TO ACKNOWLEDGE THE CONSTITUTIONAL RULE ENUNCIATED BY THIS COURT IN *ST. AMANT* V. *THOMPSON* IS REVERSIBLE ERROR.

The Montana Supreme Court's rejection of the jury instruction based upon the verbatim language of *St. Amant* and the court's failure to even acknowledge the existence of the case is clear error warranting summary reversal.

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court established constitutional protections for media defendants in defamation actions. The Court held that public officials must prove by clear and convincing evidence that defamatory statements were published with actual malice; that is, with knowledge of falsity or reckless disregard for truth. In rejecting the common law rules of strict liability and presumed damages, this Court reaffirmed its commitment to the principle that uninhibited discussion of the conduct of public officials was fundamental to the operation of the American system of government. *Id.* at 270.

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in the amount — leads to . . . self-censorship.

Id. at 297.

In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), this Court held that actual malice in the form of reckless disregard for truth requires "a high degree of awareness of their probable falsity."

This Court further refined the definition of actual malice in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), holding that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the

> truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 730-31.

This Court's ruling in *St. Amant* identified the following evidence that may be employed to attempt to establish "actual malice":

> 1. The communication has been fabricated by the defendant;
>
> 2. It is the product of the defendant's imagination;
>
> 3. It is based wholly on an unverified anonymous telephone call;
>
> 4. It contains allegations that are so inherently improbable that only a reckless person would put them in circulation;
>
> 5. It is published despite obvious reasons to doubt the veracity of the informant upon whom the article is based or the accuracy of his reports.

It is undisputed that mere failure to investigate does not in itself establish "actual malice." *St. Amant, supra,* at 733. It is equally well settled that a mistake in interpreting events or documents does not evidence the necessary state of mind. *Time. Inc.* v. *Pape*, 401 U.S. 279 (1971); *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979). Publishing facts harmful to the plaintiff while not publishing others that were mitigating does not constitute actual malice. *Reliance Insurance Co.* v. *Barron's,* 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977). It is similarly insufficient for a plaintiff to point to vituperation or exaggerated language. *Guthrie* v. *Annabel,* 50 Ill. App.3d 969, 365 N.E.2d 1367, 3 Media L. Rep. (BNA) 1152 (1977); *Rose* v. *Koch,* 278 Minn. 235, 154 N.W.2d 409 (1967). Such evidence does not indicate a publisher's lack of belief in the truth of his statements.

Investigative failures, if they do not in context indicate knowledge of falsity or subjective awareness of probable falsity, cannot themselves constitute "actual malice." *St. Amant* v. *Thompson, supra,* at 733. This Court has reaffirmed the rule set forth in *St. Amant* without reservation or modification in numerous cases in recent years.[9]

The Montana Court's failure to even acknowledge the existence of *St. Amant* is inexplicable. That court's rejection of the jury instruction based upon the verbatim language of *St. Amant* is clear error requiring summary reversal.

IV. THE ACTION OF THE MONTANA SUPREME COURT IN REVERSING THE JURY'S VERDICT IN FAVOR OF THE NEWSPAPER DEFENDANT CONSTITUTES IMPERMISSIBLE GOVERNMENT REGULATION OF FREEDOM OF EXPRESSION.

"Error and misstatement are inevitable in any scheme of truly free expression and debate." *Lorain Journal* v. *Milkovich,* ____ U.S. ____, 106 S. Ct. 322, 88 L.Ed.2d 305 (1985) (Brennan, Jr. dissenting). "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 341 (1974). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

Through a number of decisions, this court has defined limits on the government's ability to restrict free expression. *See, e.g., Stromberg* v. *California,* 283 U.S. 359 (1931); *Bridges* v. *California,* 314 U.S. 252 (1941); *Roth v. United States,* 354 U.S. 476

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[9] *See, e.g., Bose Corp.* v. *Consumers Union of United States, Inc.,* 466 U.S. at 511 n.30; *Herbert* v. *Lando,* 441 U.S. 153, 156 (1979); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 332 (1974); *Time, Inc.* v. *Pape,* 401 U.S. 279, 291-92. *See also Wolston* v. *Reader's Digest Ass'n. Inc.* 443 U.S. 157, 163 (1979); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 276 (1971); *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 84-85 (1967); *Garrison* v. *Louisiana,* 379 U.S. 64, 75-76 (1964).

(1957); *NAACP* v. *Button,* 371 U.S. 415 (1963). A Court decision, too, is state action and, thus, state regulation. *See New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964).

In reviewing the evidence in the light most favorable to the plaintiff, the Montana Supreme Court has negated the jury's intervention in protecting freedom of the press. Such court regulation usurps the jury's function in its role as representative of the citizenry to determine the limits to which the government may infringe on freedom of expression. *See* Parker, *Free Expression — The Jury Function,* 65 B.U.L. Rev. 483, 557 (1985).

Recent cases involving free speech emphasize the role of the court in guarding defendants in First Amendment cases from majoritarian intolerance, as expressed through jury verdicts. *Bose Corp* v. *Consumers Union of U.S., Inc.,* 446 U.S. 485 (1984). That judicial control is to be guarded jealously. However, it is easy to forget that the genesis of our jury system lay in a world where common citizens looked to their peers for protection from the tyranny of courts. P. Devlin, *Trial by Jury* n.66 at 159-60 (1956); A. Denning, *Freedom Under Law* 63-64 (1949); Henderson, *The Background of the Seventh Amendment,* 80 Harv. L. Rev. 289, 328 (1966).

Freedom of expression in this country was born in the spirit of debate that preceded our revolution. The trial of colonial printer John Peter Zenger in 1735 for seditious libel established the power of the jury in this area, dooming the use of seditious libel as a restraint on free expression for the balance of our colonial period. Nelson, *Seditious Libel in Colonial America,* 3 Am. J. Legal Hist. 160 (1959).

The court below overlooked the jury's historical function of protecting freedom of expression. Where the jury has acted to protect freedom of expression, courts should not interfere. Parker, *Free Expression — The Jury Function,* 65 B.U.L. Rev. 483, 495 (1985).

CONCLUSION

Because this case presents two serious errors of Constitutional magnitude, your amici urge this Court to grant the Petition for Certiorari and summarily reverse the opinion of the Montana Supreme Court.

Respectfully submitted,

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